

Capital Reporting Company  
In Re: Determination of Royalty Rates (Public) 04-27-2015

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Before the  
UNITED STATES COPYRIGHT ROYALTY BOARD  
Library of Congress  
Washington, D.C.

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In Re: : Docket No.  
: 15-CRB-0001-WR  
Determination of Royalty : (2016-2020)  
Rates and Terms for : Volume 1-PUBLIC  
Ephemeral Recording and : Pages 1-239  
Digital Performance of :  
Sound Recordings (Web IV) :  
-----:

PUBLIC SESSION

Washington, D.C.  
Monday, April 27, 2015

The hearing in the above-entitled  
matter was convened at 9:30 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE  
DAVID R. STRICKLER, JUDGE  
JESSE FEDER, JUDGE

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<p>1 APPEARANCES</p> <p>2</p> <p>3 On behalf of SoundExchange:</p> <p>4 MUNGER TOLLES &amp; OLSON, LLP</p> <p>5 GLENN POMERANTZ, ESQUIRE</p> <p>6 355 South Grand Avenue, 3rd Floor</p> <p>7 Los Angeles, California 90071</p> <p>8 213-683-9107</p> <p>9</p> <p>10 On behalf of GEO Music:</p> <p>11 GEORGE JOHNSON</p> <p>12 GEORGE JOHNSON MUSIC PUBLISHING</p> <p>13 23 Music Square East, Suite 204</p> <p>14 Nashville, Tennessee 37203</p> <p>15 615-242-9999</p> <p>16</p> <p>17 On behalf of Pandora Media, Inc.</p> <p>18 WEIL GOTSHAL &amp; MANGES, LLP</p> <p>19 BRUCE RICH, ESQUIRE</p> <p>20 767 Fifth Avenue</p> <p>21 New York, New York 10153</p> <p>22 212-310-8000</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 APPEARANCES (CONTINUED):</p> <p>2</p> <p>3 On behalf of National Public Radio:</p> <p>4 KING &amp; SPALDING, LLP</p> <p>5 KENNETH L. STEINTHAL, ESQUIRE</p> <p>6 101 Second Street</p> <p>7 Suite 2300</p> <p>8 San Francisco, California 94105</p> <p>9 415-318-1211</p> <p>10</p> <p>11 On behalf of Intercollegiate Broadcasting and</p> <p>12 Harvard Radio:</p> <p>13 WILLIAM MALONE, ESQUIRE</p> <p>14 40 Cobbler's Green</p> <p>15 205 Main Street</p> <p>16 New Canaan, Connecticut 06840</p> <p>17 203-966-4770</p> <p>18 On behalf of National Religious</p> <p>19 Broadcasters:</p> <p>20 WILEY REIN, LLP</p> <p>21 KARYN ABLIN, ESQUIRE</p> <p>22 1776 K Street, N.W.</p> <p>23 Washington, D.C. 20006</p> <p>24 202-719-7008</p> <p>25</p>
3	5
<p>1 APPEARANCES (CONTINUED):</p> <p>2</p> <p>3 On behalf of National Association of</p> <p>4 Broadcasters:</p> <p>5 WILEY REIN, LLP</p> <p>6 BRUCE G. JOSEPH, ESQUIRE</p> <p>7 1776 K Street, N.W.</p> <p>8 Washington, D.C. 20006</p> <p>9 202-719-7453</p> <p>10</p> <p>11 On behalf of iHeartMedia, Inc.</p> <p>12 KELLOGG, HUBER, HANSEN, TODD,</p> <p>13 EVANS &amp; FIGEL, PLLC</p> <p>14 MARK HANSEN, ESQUIRE</p> <p>15 1615 M Street, N.W.</p> <p>16 Suite 400</p> <p>17 Washington, D.C. 20036</p> <p>18 202-326-7992</p> <p>19</p> <p>20 On behalf of SiriusXM Radio:</p> <p>21 ARENT FOX, LLP</p> <p>22 PAUL FAKLER, ESQUIRE</p> <p>23 1675 Broadway</p> <p>24 New York, New York 10019</p> <p>25 212-484-3900</p>	<p>1 APPEARANCES (CONTINUED):</p> <p>2 On behalf of Educational Media Foundation:</p> <p>3 DAVID D. OXENFORD, ESQUIRE</p> <p>4 WILKINSON BARKER KNAUER, LLP</p> <p>5 2300 N Street, N.W.</p> <p>6 Suite 700</p> <p>7 Washington, D.C. 20037</p> <p>8 202-783-4141</p> <p>9</p> <p>10 On behalf of College Broadcasters:</p> <p>11 CONSTANTINE CANNON</p> <p>12 DAVID GOLDEN, ESQUIRE</p> <p>13 1001 Pennsylvania Avenue, N.W.</p> <p>14 Washington, D.C. 20004</p> <p>15 202-204-4527</p> <p>16</p> <p>17 ALSO PRESENT:</p> <p>18 For SoundExchange:</p> <p>19 Kelly Klaus, Melinda LeMoine, Martha</p> <p>20 Larraondo-Klipper, Rose Ehler, Anjan Choudhury,</p> <p>21 Colin Rushing, Jonathan Blavin, Jennifer Bryant</p> <p>22 For SiriusXM:</p> <p>23 Jackson Toof, Martin Cunniff, Patrick Donnelly,</p> <p>24 Cynthia Greer</p> <p>25</p>

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1 APPEARANCES (CONTINUED): 2 For NPR: 3 Joseph Wetzel, Ethan Davis, Antonio Lewis, 4 Gregory Lewis 5 6 For Pandora: 7 Todd Larson, Christopher Harrison, Benjamin 8 Marks, David Yolkut, Elisabeth Sperle 9 10 For iHeartMedia: 11 John Thorne, Tres Williams, Rob Wells, Donna 12 Schneider, Evan Leo, Kevin Miller, Scott 13 Angstreich, Caitlin Hall, Leslie Pope 14 15 For NAB: 16 Michael Sturm, Jennifer Elgin, Suzanne Head 17 18 19 Bonnie L. Russo, Capital Reporting Company 20 21 22 23 24 25	1 (THIS BEGINS PUBLIC SESSION) 2 P R O C E E D I N G S 3 CHIEF JUDGE BARNETT: Good morning. 4 Please be seated. 5 I was telling my friends I'm not a 6 real judge. I just play one at work, but with 7 all of the suits and the boxes and the binders, 8 suddenly I feel like a real judge again. 9 Well, good morning, all. 10 Is anyone having any trouble hearing 11 me? 12 Please let me know -- you are? 13 Okay. I will see if I can -- is 14 that any better? 15 Oh, okay. At any time during these 16 proceedings if anyone has trouble hearing, 17 please let us know. We -- otherwise, we will 18 not be aware and you could miss out on 19 something really exciting. 20 Today marks the commencement of the 21 copyright royalty judge's hearing to Determine 22 Terms and Royalty Rates for the Ephemeral 23 Reproduction and Digital Performance of Sound 24 Recordings during the period January 1st, 2016 25 to December 31st, 2020.
7	9
1 C O N T E N T S 2 3 OPENING STATEMENTS PAGE 4 By Mr. Pomerantz 17 5 By Mr. Johnson 90 6 By Mr. Rich 104 7 By Mr. Joseph 151 8 By Mr. Hansen 188 9 By Mr. Fakler 193 10 By Ms. Ablin 204 11 By Mr. Malone 225 12 13 14 15 CLOSED-SESSION PAGE 16 OPENING STATEMENTS 17 By Mr. Pomerantz 238 18 By Mr. Joseph 255 19 By Mr. Hansen 264 20 By Mr. Rich 325 21 22 23 24 25	1 For those of you I have yet to meet, 2 I am Judge Suzanne Barnett. Seated to my right 3 is Judge Jessie Feder. Seated to my left, 4 Judge David Strickler. 5 Our attorney advisor, Mrs. Kim 6 Whittle has been drafted for the duration to 7 act as clerk of the court. She is seated over 8 in the spotlight. She will manage all exhibits 9 and keep the official record of admitted and 10 refused exhibits. At the end of the hearing, 11 she will also work with your staff to return or 12 destroy exhibits that you did not offer or that 13 the judges refused. 14 Seated at the back of the room at 15 the last row of tables is our senior counsel, 16 Mr. Rich Strausser. Richard Strausser. He 17 might and might not attend all days, but he is 18 here certainly for the beginning and what we 19 hope will be a very interesting session today. 20 You -- I'm sure you've all met our 21 court reporters today. On duty is Ms. Bonnie 22 Russo and she will be trading off with Ms. 23 Michele Eddy. They will be rotating. We have 24 two reporters, so we can all have daily 25 transcripts without having to take time off to

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10	<p>1 resuscitate the court reporter.</p> <p>2 Please respect the skill and</p> <p>3 patience of the reporters by speaking one at a</p> <p>4 time clearly and at a conversational rate.</p> <p>5 We have 13 participants in this</p> <p>6 hearing, this proceeding, excuse me. Some are</p> <p>7 jointly represented by Counsel. We anticipate</p> <p>8 some ebb and flow of counsel witnesses and</p> <p>9 guests during the course of the hearing. We</p> <p>10 ask that anyone entering or leaving the hearing</p> <p>11 room do so without disturbing the ongoing</p> <p>12 proceedings to the extent possible. We have</p> <p>13 crowded the room and rearranged tables and</p> <p>14 welcomed shelving and technology and so forth</p> <p>15 to accommodate this hearing. As a result, in</p> <p>16 the counsel table rows, some power and data</p> <p>17 monuments on the floor could present a tripping</p> <p>18 hazard. Be alert. You have been warned. We</p> <p>19 know they are there. Now you know they are</p> <p>20 there.</p> <p>21 All of the parties have brought in</p> <p>22 voluminous materials all over the room and so</p> <p>23 we ask that you exercise care and courtesy when</p> <p>24 you are gaining access to those materials or</p> <p>25 moving about the hearing room. As on the side,</p>	12
11	<p>1 it is public knowledge, indeed, it is</p> <p>2 statutorily mandated that the judges employe</p> <p>3 three full-time staff members total. While our</p> <p>4 program specialist, administrative specialist</p> <p>5 was in the process of wrangling dozens of</p> <p>6 banker's boxes of binders and documents for</p> <p>7 this proceeding, one of our folding tables</p> <p>8 collapsed, dumping table boxes and all on our</p> <p>9 program specialist. For the past week, she has</p> <p>10 been on leave nursing an injured back. She</p> <p>11 expects and we hope for a full recovery, but</p> <p>12 that means our total person power for the past</p> <p>13 week has been five strong.</p> <p>14 Now, in the interest of full</p> <p>15 disclosure, I want to state that many of the</p> <p>16 participants in this proceeding who work with</p> <p>17 larger teams have pitched in generously. We</p> <p>18 welcomed, thankfully, that assistance with</p> <p>19 logistics, technology, document preparation and</p> <p>20 moral support. The staffs of the participants</p> <p>21 work with our attorney advisor. The judges do</p> <p>22 not know, and therefore cannot be influenced by</p> <p>23 which participants in particular provided the</p> <p>24 necessary assistance, but we do want you all to</p> <p>25 know that we appreciate it greatly.</p>	13
	<p>1 There are some loose ends. Motions</p> <p>2 and amendments and supplements continue to flow</p> <p>3 into our office until late in the day last</p> <p>4 Friday. We, as a panel, have not discussed the</p> <p>5 contents of the papers filed within the last</p> <p>6 week. A partial list includes Pandora's</p> <p>7 objections to Mr. Johnson's exhibits; service</p> <p>8 participants objections to Mr. Johnson's</p> <p>9 exhibits; SoundExchange motions in limine;</p> <p>10 SoundExchange motion to strike portions of</p> <p>11 testimony; service participants objections to</p> <p>12 SoundExchange exhibits; SoundExchange response</p> <p>13 to iHeart response to SoundExchange evidentiary</p> <p>14 objections; service participants objections to</p> <p>15 SoundExchange proposed supplemental exhibits;</p> <p>16 iHeart second supplemental exhibit list;</p> <p>17 National Religious Broadcasters supplemental</p> <p>18 exhibits and amended exhibit list; NAB</p> <p>19 supplemental exhibit and amended exhibit list;</p> <p>20 iHeart emergency motion challenging</p> <p>21 SoundExchange's assertion of privilege and</p> <p>22 attempt to clawback documents. And some of</p> <p>23 those arrived in our second mail delivery on</p> <p>24 Friday. Really.</p> <p>25 To the extent you need guidance on</p>	

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14	<p>1 licensee services will then have an opportunity 2 to present the direct case detailing their 3 proposed rates and terms and the support 4 therefor. Following the licensee services 5 presentation, the licensors will have an 6 opportunity to rebut. Counsel will examine 7 their witnesses and all other parties may 8 cross-examine each witness. 9 At the end of the presentation of 10 all the evidence, direct and rebuttal, the 11 parties will have an opportunity to make 12 closing arguments, sometimes called a 13 summation, in which they state the applicable 14 law and the way they wish the judges to apply 15 that law to the evidence. Closing arguments 16 are currently scheduled for June 3rd. 17 If you are in this hearing room 18 today, you are undoubtedly aware that the 19 issues the judges must consider require review 20 of sophisticated economic analyses, 21 confidential business strategies, and sensitive 22 financial information. 23 Early in the proceeding, the judges 24 issued a protective order requiring every 25 participant to follow a protocol to maintain</p>	16	<p>1 confidential portions of the parties' opening 2 statements. 3 Counsel, we understand that some of 4 you have the realtime transcript streaming to 5 your offices. Be advised that the protective 6 order applies to your office and assure that no 7 individual is privy to the realtime stream 8 unless that individual is permitted by the 9 protective order. We appreciate your 10 cooperation in this process. 11 At this time, I ask that lead 12 counsel for each party -- we'll just go down 13 this side and come back up this side -- lead 14 counsel, please stand, identify yourself for 15 the record, introduce your client, 16 representatives, your co-counsel, and staff who 17 are here. 18 MR. POMERANTZ: Good morning, Your 19 Honor. 20 I'm Glenn Pomerantz, and I'll be 21 representing SoundExchange in this proceeding. 22 CHIEF JUDGE BARNETT: Pleased to 23 meet you, Mr. Pomerantz. 24 MR. POMERANTZ: Thank you. 25 CHIEF JUDGE BARNETT: I think this</p>
15	<p>1 and protect the confidential nature of 2 information the parties rely upon to advocate 3 for a desired royalty rate. The fact that this 4 is an open hearing does not override the 5 parties' need to protect their confidential 6 business information. Throughout all the early 7 phases of this proceeding, all parties have 8 diligently marked and edited confidential 9 documents and have filed copies of all 10 documents redacted for public viewing along 11 with restricted documents for the judges' 12 review. 13 Whenever a party needs to question a 14 witness regarding restricted documents, the 15 judges will direct that any person in the 16 hearing room, who has not signed an appropriate 17 nondisclosure certificate, to leave the room 18 and wait outside until we reopen the room. The 19 first time we will need to close the hearing 20 room is today for the parties to describe 21 adequately the range and the import of their 22 evidence they need to discuss and display 23 confidential information. The parties will 24 begin with the public opening statement. Then 25 we will close the room and hear the</p>	17	<p>1 is our first meeting. 2 MR. POMERANTZ: Yeah, and it's nice 3 to meet all of you. 4 Let me introduce my colleagues who 5 are sitting here at counsel table. This is Mr. 6 Kelly Klaus, Melinda LeMoine, Martha 7 Larraondo-Klipper, Jennifer Bryant, Jonathan 8 Blavin, Anjan Choudhury of our office. I 9 skipped Mr. Collin Rushing, who is the general 10 counsel of SoundExchange. 11 There's other people in the room in 12 the back who are also either with our firm or 13 with SoundExchange, and I'm sure you will get a 14 chance to meet them during the course of the 15 proceeding, but this is probably sufficient for 16 right now. 17 CHIEF JUDGE BARNETT: Thank you. 18 Mr. Pomerantz, I understood that 19 SoundExchange was going to be sharing table 20 space with Mr. Johnson. 21 Is Mr. Johnson here? 22 MR. POMERANTZ: I understood that, 23 too, and I thought I was sharing some time 24 today with him. So we'll have to wait and see, 25 but I -- I don't know what his schedule is.</p>

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18	<p>1 CHIEF JUDGE BARNETT: Nor do we. 2 Thank you. 3 Mr. Fakler, good morning. 4 MR. FAKLER: Good morning. 5 And, Your Honor, my name is Paul 6 Fakler. I'm with the firm of Arent Fox. I am 7 here today on behalf of SiriusXM Radio. I'm 8 working with my colleagues Martin Cunniff, 9 Jackson Toof, as well as Patrick Donnelly, who 10 is the executive vice president and general 11 counsel of SiriusXM Radio, as well as Cynthia 12 Greer, vice president and associate counsel. 13 CHIEF JUDGE BARNETT: Thank you. 14 Last but not least row. 15 MR. STEINTHAL: Kenneth Steinthal 16 from King &amp; Spalding for NPR. We were not 17 expecting to be here at some point today. I'll 18 address why we're here today. We're working 19 that out with the participants. I just need a 20 little bit of time. 21 CHIEF JUDGE BARNETT: I expected 22 that -- well, I wasn't sure how NPR and CBI 23 were going to cope with the fact that your 24 agreements are still pending, so... 25 MR. STEINTHAL: Correct.</p>	20	<p>1 Harvard Radio Broadcasting Company, 2 Incorporated, the licensee of station WHRB in 3 Cambridge, Massachusetts. I am unaccompanied. 4 CHIEF JUDGE BARNETT: Thank you. 5 Good morning. 6 MR. JOSEPH: Good morning, Your 7 Honor. 8 Bruce Joseph of Wiley Rein 9 representing the National Association of 10 Broadcasters. I am here with a number of 11 colleagues. My partner, Karyn Ablin and 12 Michael Sturm, who will also be involved. I 13 have a number of people in the back, maybe we 14 can introduce them later or I can introduce 15 them now if you would prefer. 16 CHIEF JUDGE BARNETT: Let's do it -- 17 well, go ahead. Let's meet them all. 18 MR. JOSEPH: Okay. Colleagues 19 Christopher Mills, Leslie Weeks. Along in the 20 back, Jennifer Elgin. 21 CHIEF JUDGE BARNETT: Good morning. 22 MR. JOSEPH: And we have here the 23 associate general counsel of NAB, Ms. Suzanne 24 Head and another lawyer who is working with us 25 on behalf of NAB, David Oxenford.</p>
19	<p>1 And that's -- we can do that now or 2 do it later. 3 CHIEF JUDGE BARNETT: Let's do it 4 later. 5 Okay. Someone here representing 6 CBI? 7 MR. GOLDEN: Your Honor, David 8 Golden from College Broadcasters. A short 9 statement. 10 CBI is a settled party. They have 11 jointly moved with SoundExchange -- CBI is a 12 settled party. They have jointly moved with 13 SoundExchange to have their settlement adopted 14 as a statutory rates in terms for noncommercial 15 educational broadcasters. The settlement was 16 submitted pursuant to 17 U.S.C. 801(b)(7)(A). 17 That was published for comment and received. 18 Thank you. 19 CHIEF JUDGE BARNETT: Thank you. 20 Now, beginning at this back. 21 Malone. 22 MR. MALONE: Good morning, Your 23 Honor. I'm William Malone. I represent two 24 parties here. The first is the Intercollegiate 25 Broadcasting System, and the second is the</p>	21	<p>1 CHIEF JUDGE BARNETT: Thank you. 2 Mr. Joseph, I think we've met only 3 once and it was across the street. We 4 haven't -- you haven't been in here in room 5 with us, with this particular panel. 6 MR. JOSEPH: I have not had that 7 honor, Your Honor. We did meet at another 8 hearing, as I recall. 9 CHIEF JUDGE BARNETT: That's right. 10 MR. HANSEN: Good morning, Your 11 Honor. 12 Mark Hansen. With me is John Thorne 13 of Kellogg Huber, representing iHeartRadio. At 14 the table is Tres Williams, Mr. Rob Walls, Ms. 15 Donna Schneider, counsel at iHeartRadio. Mr. 16 Rob over there on the technology table. We 17 will be seeing his wizardry and we have other 18 colleagues in the courtroom, which I'm sure you 19 will come to know during the course of the 20 hearing. 21 Thank you, Your Honor. 22 CHIEF JUDGE BARNETT: Thank you. 23 Mr. Rich, we meet again. 24 MR. RICH: Good morning, Your Honor. 25 Nice to meet Judges Feder and Strickler.</p>

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22	<p>1 I'm Bruce Rich representing Pandora 2 Media. With me at the front table are my 3 partners Todd Larson and Ben Marks. Sandwiched 4 in between is Chris Harrison and legal counsel 5 to Pandora Media. In the far corner as 6 co-counsel is Jacob Ebin, a former colleague of 7 mine who is now with Akin Gump. And in the 8 back of the courtroom we have several other 9 lawyers, several of whom I think will stand up 10 and actually take and cross-examine witnesses, 11 which is wonderful. Reid Collins, David 12 Yolkut, Jennifer Ramos, our trustee paralegal, 13 and we are pleased to be here. 14 CHIEF JUDGE BARNETT: Thank you. 15 MR. RICH: Oh, let me -- I did 16 neglect another co-counsel, Gary Greenstein, 17 who is also, I think, in the courtroom. There 18 he is. Gary. 19 MR. JOSEPH: Your Honor. I'm sorry 20 to get back up, but I should mention that my 21 colleague Karyn Ablin will be taking the lead 22 for National Religious Broadcasting licensing. 23 CHIEF JUDGE BARNETT: You 24 anticipated my question. 25 Thank you, Mr. Joseph.</p>	24	<p>1 splitting my time with Mr. Johnson and so what 2 I had anticipated, since you had assigned us 3 two hours of time, and as one of my colleagues 4 had discussed with Mr. Johnson was that he 5 asked for 15 minutes. So I understood that I 6 would have an hour and 45 minutes. I will 7 divide that up between this morning's public 8 opening and probably this afternoon's 9 confidential. 10 CHIEF JUDGE BARNETT: We don't know 11 his schedule, but just keep an eye on the 12 floor. He might come in. I don't know him. I 13 haven't met him, so... 14 MR. POMERANTZ: We are both in the 15 same boat. I have not met him either and 16 wouldn't recognize him; but, hopefully, he'll 17 acknowledge who he is when he enters the room. 18 CHIEF JUDGE BARNETT: Okay. Great. 19 Thank you. 20 MR. POMERANTZ: At the outset of 21 this proceeding, this board issued a notice 22 with some important questions. You asked about 23 the possibility of establishing a rate that is 24 based on a percentage of revenue, at least in 25 part. And you asked whether the differences</p>
23	<p>1 Mr. Pomerantz, you may begin your 2 public opening statement. 3 MR. POMERANTZ: Thank you, Your 4 Honor. 5 Most of the materials that I'll be 6 using I'll put up on the screens for Your 7 Honor, but there are a few materials that I'll 8 direct your attention to that are confidential, 9 and I will just look at them in the binder. If 10 I may hand the binder to Your Honor and spread 11 them around to other counsel? 12 CHIEF JUDGE BARNETT: Certainly. 13 MR. POMERANTZ: Thank you. 14 CHIEF JUDGE BARNETT: And you will 15 forgive us if we turn our back to look at the 16 wall. 17 MR. POMERANTZ: I understand that, 18 Your Honor. 19 I have -- how many -- can I 20 approach, Your Honor? 21 CHIEF JUDGE BARNETT: Yes, please. 22 You may. Whether you can is a different 23 matter. 24 Good morning. 25 MR. POMERANTZ: I had thought I was</p>	25	<p>1 among the buyers and sellers in this market 2 might affect the rates. And you asked several 3 other important questions. And you also issued 4 an early order in this proceeding in which you 5 asked us to provide you with a thick market of 6 agreements so that you can better understand 7 the market. 8 Over the next five weeks, we will do 9 our best to answer your questions and we will 10 provide you with that thick market of 11 agreements. And, at the end of the day, we 12 think the evidence will prove four things. And 13 I'm going to start using the slides now. 14 First, we will prove that the 15 interactive service agreements are the most 16 reasonable benchmarks, and we say that for 17 several reasons. Perhaps, most importantly, 18 though, it's because consumer behavior has made 19 interactive services and non-interactive 20 services closer than ever. 21 I'm holding my phone. This is how 22 most people today listen to music. Most people 23 listen to music through their phones. And what 24 they are looking for is a series of songs that 25 fits their own personal tastes, and that's what</p>

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26	<p>1 you get when you listen to your personalized 2 radio stations from Pandora or iHeart. And 3 that's also what you get when you listen to the 4 playlist that you create on Spotify and other 5 interactive services. 6 So, today, Pandora and iHeart, 7 statutory Webcasters, are competing head to 8 head with Spotify and other interactive 9 services for the very same listeners; the ones 10 who want to listen to music on their mobile 11 devices. 12 Consumers do not care whether a 13 service is called noninteractive or 14 interactive. All they care about is accessing 15 music that they like, that fits their own 16 personal desires and interests. And if the 17 experience that consumers have with interactive 18 and non-interactive services are getting 19 closer. And if the competition between 20 noninteractive and interactive services are 21 getting closer, then economics is going to tell 22 us that the terms of their agreements would get 23 closer if there wasn't a statutory license. 24 Now, there still would need to be 25 some adjustment for interactivity. One has it,</p>	28	<p>1 or it's on a per subscriber basis or both. And 2 then it's a greater of that or a specified 3 share of the revenue. 4 And the uniform usage of the 5 greater-of formulas and all the market 6 agreements you're going to see tells us 7 something very important. It tells us that if 8 there wasn't a statutory license, the record 9 companies and the Webcasters would agree to a 10 greater-of formula because that's what's 11 happening in the marketplace. And that's why 12 our proposal has a greater-of formula. 13 And, fourth, what you will see is 14 that the services rate proposals are 15 unreasonable. Rate proposals have been 16 submitted not just by us, but by Sirius, 17 Pandora and iHeart and NAB. And here is our 18 rate proposal right here. We will see what's 19 the current Web III rates are, and this is our 20 proposal. We continue on from 2016 to 2020, 21 and then we have a greater-of formula where you 22 have either the per-play rate or a sharing of 23 55 percent of the revenue amongst the copyright 24 owners. That's our proposal. 25 Here is the proposal that's offered</p>
27	<p>1 the other doesn't. But the interactive service 2 agreements are an even better benchmark today 3 than five years ago when this panel had the Web 4 III proceeding. 5 The second thing that we will prove 6 in this hearing is that the Apple agreements 7 with Sony and Warner for the iTunes radio 8 service also support our rate proposal. When 9 we look at the rates and terms in those 10 agreements, we'll see that they're much closer 11 to the rate proposal offered by SoundExchange 12 than the rate proposal offered by the services. 13 And that's regardless of whether you look at 14 the rates derived from the projections of the 15 parties when they entered into the contract or 16 the rates derived from the actual usage and 17 payments under the contracts as they have been 18 performing. 19 Third, we will show that virtually 20 all of the benchmark agreements offered by all 21 of the participants use a greater-of rate 22 structure. These agreements generally require 23 a service to pay the greater of two or three 24 things. There's usually a minimum floor. The 25 minimum floor is either on a per stream basis</p>	29	<p>1 by the services compared to ours. And I'm 2 focusing right now on the per-play rates. 3 There is ours. Sirius has -- I'm going to say 4 \$0.16 because it's just easier than all the 5 zeros. I think others might use the same 6 terminology. Hopefully, we can all agree on 7 that. 8 Pandora is at 11, and then slightly 9 increasing over time. iHeart is \$0.05 and so 10 is NAB. 11 I would note there's a footnote to 12 Pandora. Pandora joins us in a greater-of 13 formula. They have a lower percentage of 14 revenue that's shared, but they also have a 15 greater-of formula in their proposal. 16 Now, let me try to put these 17 proposals into context. This is what the 18 parties are proposing. I'm just comparing the 19 current rates, 2015 CRB rates, to what the 20 per-play rates are that each party proposes in 21 2016. And you can see that we're proposing a 22 slight uptick. Sirius is proposing a 30 23 percent decrease. Pandora, more than 50 24 percent. And iHeart and NAB, almost 80 25 percent.</p>



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30	<p>1       What these services proposals are</p> <p>2   telling us is they believe something is</p> <p>3   terribly wrong in the market and that drastic</p> <p>4   measures need to be taken to fix it. Well, we</p> <p>5   strongly disagree with that, and we think the</p> <p>6   evidence will show that there is nothing</p> <p>7   drastically wrong with the Webcasting market.</p> <p>8   We think the evidence is going to show that</p> <p>9   that market is already shown significant</p> <p>10   growth, as well as significant innovation. And</p> <p>11   we think that the evidence will show that our</p> <p>12   proposed benchmark agreements and our rate</p> <p>13   proposal is exactly what a willing buyer and a</p> <p>14   willing seller would agree to in a world in</p> <p>15   which there wasn't a statutory license.</p> <p>16       Now, I have already introduced to</p> <p>17   you the members of our team. We're really</p> <p>18   pleased to be her. It's our first time in</p> <p>19   front of this panel, and it's been an</p> <p>20   interesting trip so far. Looking forward to</p> <p>21   the next five weeks.</p> <p>22       I failed to mention our technology</p> <p>23   colleague, Phil Nichols. And you'll -- Mr.</p> <p>24   Nichols can bring up any documents that you</p> <p>25   need during the course of the proceedings, if</p>	32	<p>1   companies. I see three and one record company</p> <p>2   -- I'm sorry. Independent record company</p> <p>3   agent, Merlin, and you will have artists and</p> <p>4   artist representatives. You'll hear from all</p> <p>5   facets of SoundExchange.</p> <p>6       And then you will also hear from a</p> <p>7   series of experts. This is, obviously, an</p> <p>8   economically driven exercise and there's a</p> <p>9   number of economists. These are the economists</p> <p>10   that you will hear from, as well as a survey</p> <p>11   expert, Ms. Butler. And we hope that through</p> <p>12   the -- our presentation of all of this</p> <p>13   testimony, we will provide you with a broad and</p> <p>14   a detailed look into the music streaming</p> <p>15   market.</p> <p>16       The services, of course, are going</p> <p>17   to have a lot of witnesses of their own. And</p> <p>18   I'm guessing that we're going to have some</p> <p>19   disagreements between the witnesses as to</p> <p>20   certain facts. But I actually think there's</p> <p>21   two facts that every witness is going to agree</p> <p>22   on, and so let me start with the facts -- and I</p> <p>23   think every witness is going to agree.</p> <p>24       Here is the first fact: More and</p> <p>25   more consumers are using streaming services to</p>
31	<p>1   that proves necessary.</p> <p>2       And our firm has been privileged to</p> <p>3   work with SoundExchange, our first time also</p> <p>4   working with SoundExchange. And while it is</p> <p>5   our firm's first time in these proceedings,</p> <p>6   it's certainly not SoundExchange's first time.</p> <p>7       As in prior proceedings,</p> <p>8   SoundExchange is here representing artists and</p> <p>9   record companies, established artists, and</p> <p>10   artists who are still trying to break through,</p> <p>11   the three major record companies, as well as</p> <p>12   thousands of independent labels. SoundExchange</p> <p>13   has been proud to serve as the entity that</p> <p>14   collects the royalties and distributes them to</p> <p>15   the artists and represent -- and the record</p> <p>16   companies, and they certainly hope to continue</p> <p>17   in that role in the future.</p> <p>18       In the course of our case, you're</p> <p>19   going to hear from every constituency of</p> <p>20   SoundExchange. Here's a list of our witnesses,</p> <p>21   and I have organized them by constituents.</p> <p>22   There will be witnesses from SoundExchange,</p> <p>23   itself. We'll have representatives from each</p> <p>24   of the major record companies. We will have</p> <p>25   representatives from four independent record</p>	33	<p>1   access music. For decades, people in the</p> <p>2   industry and probably a lot of us outside the</p> <p>3   industry kind of referred to music products by</p> <p>4   their format; vinyl, cassettes, CDs, downloads.</p> <p>5       CHIEF JUDGE BARNETT: Eight track.</p> <p>6       MR. POMERANTZ: Eight track.</p> <p>7       Today, people in the industry don't</p> <p>8   tend to refer to music products by format.</p> <p>9   They tend to refer to it by business model.</p> <p>10   And the two business models you're going to</p> <p>11   hear about are what's called the ownership</p> <p>12   model and the access model.</p> <p>13       The ownership model refers to sales</p> <p>14   of music products that people who own -- you</p> <p>15   own a CD or you own the download. What you</p> <p>16   will see is that consumers are moving away from</p> <p>17   owning music products. This slide shows you</p> <p>18   what's happening with CDs. It's declining year</p> <p>19   after year after year. This shows 2005 to</p> <p>20   2013.</p> <p>21       JUDGE STRICKLER: Mr. Pomerantz, I</p> <p>22   have a question for you. Which, if any, of</p> <p>23   your economic experts will use an access model</p> <p>24   to describe the value of the proposed rates as</p> <p>25   opposed to any other model?</p>

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34	<p>1 MR. POMERANTZ: I think that</p> <p>2 Professor Rubinfeld's course look at the</p> <p>3 agreements that were reached between record</p> <p>4 companies and streaming services. And so to</p> <p>5 that extent, it's focused on the access model</p> <p>6 because streaming services, as I'll get to,</p> <p>7 that is the access model. And then Professor</p> <p>8 Talley will also be focused on that. I think,</p> <p>9 actually, all of our experts, because they're</p> <p>10 focused on what's happening in the streaming</p> <p>11 business much more so than what's happening</p> <p>12 with compact discs or downloads, will be</p> <p>13 focused on what I would call the -- what they</p> <p>14 call the access mode.</p> <p>15 And then downloads has taken a turn.</p> <p>16 Here is what's happening with downloads. It</p> <p>17 was going up until 2012. And now sales of</p> <p>18 downloads through the iTunes store, which is</p> <p>19 the -- by far, the largest retailer of</p> <p>20 downloads, and other download retailers,</p> <p>21 they're declining. It went down in 2013,</p> <p>22 further down in 2014, and initial numbers show</p> <p>23 going down again in 2015.</p> <p>24 Now, the access model, as we just</p> <p>25 discussed, that refers to streaming services;</p>	36	<p>1 It's not just the usage of these</p> <p>2 services that has changed. What's also changed</p> <p>3 is the platform they're using to access it.</p> <p>4 What this chart shows is what the movement from</p> <p>5 using -- listening to a streaming service with</p> <p>6 your desktop computer to listening to music</p> <p>7 with a mobile device. This is Pandora's</p> <p>8 numbers. And you see just five years ago, in</p> <p>9 the first quarter of 2010, only 14 percent of</p> <p>10 Pandora's users were listening to Pandora</p> <p>11 through a mobile phone. And now in the middle</p> <p>12 of 2014, it's 80 percent.</p> <p>13 The mobile device is becoming the</p> <p>14 primary platform for listening to music through</p> <p>15 these streaming services. Given this dramatic</p> <p>16 change, it's not surprising that a lot of</p> <p>17 companies have entered the streaming business,</p> <p>18 because when consumers go there companies</p> <p>19 follow. Some of the biggest and most powerful</p> <p>20 companies in America have entered the streaming</p> <p>21 business since 2010, since Web III; Google,</p> <p>22 Apple, Amazon, and so have a lot of others</p> <p>23 entered the business, startups, innovators,</p> <p>24 both statutory Webcasters and interactive</p> <p>25 services.</p>
35	<p>1 both interactive and noninteractive. They're</p> <p>2 access models. Because what they do is they</p> <p>3 allow ready access to a large catalog of music.</p> <p>4 You don't own it, but you have access to it.</p> <p>5 And consumers are moving to the access model in</p> <p>6 numbers that are absolutely staggering and</p> <p>7 absolutely fast.</p> <p>8 Here is what see in the numbers.</p> <p>9 This is the number of people in America who are</p> <p>10 using a streaming service each week. And you</p> <p>11 can see how it's grown dramatically. The last</p> <p>12 time we were here on a Webcasting proceeding in</p> <p>13 2010, 43 million Americans were listening to a</p> <p>14 streaming service each week. Now it's in the</p> <p>15 94 million. That's -- greater than one in four</p> <p>16 Americans access music every single week</p> <p>17 through a streaming service.</p> <p>18 And the listening hours have gone</p> <p>19 through the roof. This is how many hours each</p> <p>20 of those listeners is listening to a streaming</p> <p>21 service each week. So back in 2010, it was</p> <p>22 eight hours a week, and now it's over 13 hours</p> <p>23 a week, on average, that a streaming listener</p> <p>24 is listening to music through a streaming</p> <p>25 service.</p>	37	<p>1 There's been a lot of entry since</p> <p>2 2010 because that's where consumers are going.</p> <p>3 So, of course, that's where businesses go. And</p> <p>4 Pandora stands out. We've got to mention</p> <p>5 Pandora. It's by far and away the most popular</p> <p>6 noninteractive in this country.</p> <p>7 Let's look at Pandora's group. Just</p> <p>8 Pandora. In 2011, Pandora had 29 million</p> <p>9 active listeners. By the beginning of last</p> <p>10 year, they had 75 million active listeners.</p> <p>11 And I think Pandora is now recording over 80</p> <p>12 million active listeners. That's a lot of</p> <p>13 people in America using Pandora to listen to</p> <p>14 music.</p> <p>15 This shows the listening hours.</p> <p>16 This is listening hours on Pandora. And those</p> <p>17 numbers, those are billions of hours.</p> <p>18 So, in 2011, Pandora listeners</p> <p>19 listened to 7.8 billion hours of music. And,</p> <p>20 in 2014, it's over 20 billion hours.</p> <p>21 And, of course, Pandora dominates</p> <p>22 the Webcasting space. This is Pandora data. I</p> <p>23 think it may be before the iTunes radio service</p> <p>24 entered the market. But this shows Pandora's</p> <p>25 share, according to Pandora, at the time this</p>

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38	<p>1 chart was created in the last few years, couple 2 of years. And, at that time, they had 77.6 3 percent of the Webcasting market. IHeart was 4 second at 10 percent. And everybody else had 5 smaller amounts. 6 And I should also highlight Spotify. 7 Spotify is not a statutory service. It has 8 on-demand features. It was not even in the 9 market in the United States in 2010, the last 10 time that it was a Webcasting proceeding. It 11 entered in 2011. 12 Today, Spotify is by far the largest 13 subscription music streaming service in 14 America. It dominates the subscription music 15 streaming space. 16 Now, this shift in consumer behavior 17 has, of course, shifted the revenue of the 18 record companies. What you see in the red on 19 the bottom is streaming. And in just the last 20 three years, it's grown from a billion dollars 21 to \$1.9 billion. Very dramatic growth. And 22 you can see that in 2014 it now exceeds CD 23 revenue. And you can see that the download 24 revenue is declining. 25 The projections are that streaming</p>	40	<p>1 just to make sure we're all starting at the 2 same place is to see exactly how Pandora works 3 and how iHeart works, the two leading statutory 4 Webcasters; and how Spotify works, the largest 5 non-statutory streaming service. And you will 6 see how they're trying to meet what consumers 7 want. 8 So here is Pandora. And what 9 happens is when you start a Pandora, this is 10 the very first thing that you see. And I went 11 to my colleague, Mr. Choudhury back there, and 12 I said Mr. Choudhury, Anjan Choudhury, I said, 13 who is your favorite artist. And whether he 14 actually said this or not, what I wrote down 15 was Katy Perry. And so I said, okay, we're 16 going to use Katy Perry. And when you enter 17 Katy Perry, this is what happens on Pandora. 18 Up in the upper left, you get a Katy Perry 19 radio station. And the very first track that 20 Pandora plays for you, at least played when we 21 were doing this experiment, was "Last Friday 22 Night." See that there by Katy Perry. 23 And I asked Mr. Choudhury: Do you 24 like "Last Friday Night"? 25 He said, yeah, I really do. So we</p>
39	<p>1 revenue is going to quickly overtake the 2 download revenue, and certainly during the next 3 term, the 2016 to 2020 term, streaming will 4 overtake downloads. 5 Now, let me go to the second fact 6 that I think where all the witnesses will agree 7 to, and that's as consumers' listening habits 8 evolve, so do the streaming services. That's 9 just basic economics. Supply and demand. What 10 consumers want, businesses try to provide. 11 At the time of the Web III hearing 12 in 2010, the difference between what a 13 noninteractive service was and what an 14 interactive service was seemed pretty clear at 15 the time. An interactive service was 16 on-demand. You can pick what music you want to 17 listen to and it plays it. And noninteractive 18 meant that the service basically picked the 19 music for you, although you could, as a user, 20 influence what they delivered to you. And that 21 was the basic sense. 22 Today, it's not quite so simple, 23 because as consumer behavior has changed, both 24 noninteractive and interactive services have 25 responded to it. I think what would be helpful</p>	41	<p>1 clicked the thumbs-up button at the top and 2 that's a message to the Pandora algorithm that 3 Anjan likes "Last Friday Night" by Katy Perry, 4 and the algorithm remembers that so that the 5 next time Mr. Choudhury comes back and he 6 clicks on his Katy Perry radio station, it will 7 remember that he likes "Last Friday Night" and 8 it will make sure that's in the mix of music 9 that he hears. When that song is over, Pandora 10 plays the next one and it's a song below by 11 Kesha. And it's an artist that Pandora's 12 algorithm thinks is like Katy Perry and that 13 Mr. Choudhury will like it, Kesha -- "Blow" by 14 Kesha. 15 But the algorithm wasn't quite right 16 this time, and Mr. Choudhury said, you know, I 17 don't really like "Blow" by Kesha. I like 18 Kesha, but not "Blow." So it gives him a 19 thumbs down, and that tells the Pandora 20 algorithm don't include this song on my Katy 21 Perry radio station. And so it goes on. 22 And the third track he got was 23 "Teenage Dream" by Katy Perry, and this is 24 actually what happened when we did this. So 25 you can see that in the two of the first three</p>

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42	<p>1 songs when we entered Katy Perry, Pandora 2 delivered to Mr. Choudhury two Katy Perry 3 tracks. He likes this sounds, so he gives it a 4 thumbs up, and then the next song plays, and 5 it's "Shake It Off" by Taylor Swift. And Mr. 6 Choudhury likes Taylor Swift, but he just 7 doesn't want to listen to it right now. So he 8 clicks the skip button up at the top, and he 9 says skip this song.</p> <p>10 Pandora's algorithm understands that 11 he wants to skip it, but not keep it off of his 12 particular radio station, and it goes to the 13 next track. And it's "Tick Tock" by Kesha. 14 This track, he actually likes. He doesn't 15 dislike Kesha. He just didn't like "Blow." 16 And so he gives it a thumbs up and says, 17 Remember to include this in my Katy Perry radio 18 station, and so it goes to the next track.</p> <p>19 And that's the way that Pandora 20 works when you pick an artist. And you don't 21 just pick one radio station -- I'm sorry -- 22 one -- you don't get only one radio station. 23 You can have many radio stations. So I asked 24 Mr. Choudhury, who are your other favorite 25 artists? And he gave me a list of others. He</p>	44	<p>1 And when he's just relaxing or running or 2 driving, those are all different radio stations 3 that he can influence through the thumbs up and 4 thumbs down.</p> <p>5 And so the way this works is when 6 you decide you want to listen to music, you 7 pick up your mobile device, you click on 8 Pandora, and there is your list of radio 9 stations you have created, and you have 10 influenced through your thumbs up and thumbs 11 down. And you decide what do I feel like 12 listening to right now, and you can pick a 13 radio station that you created that you 14 specially tailored to your personal taste with 15 thumbs up and thumbs down and you can create 16 many different stations depending on what you 17 want to listen to. That's basically how 18 Pandora works.</p> <p>19 Now, I should say, Pandora worked 20 that way, largely, back in 2010. But what 21 changed was this. Now, Pandora goes 22 everywhere. Back in 2010, people weren't using 23 their mobile devices much to access Pandora. 24 You could, but people weren't doing it. But 25 now 80 percent are using their phone to access</p>
43	<p>1 said The Lumineers and Bleachers, and Vampire 2 Weekend, and Fun, all groups.</p> <p>3 And what Pandora does is it creates 4 a separate radio station for each of those 5 artists, and Mr. Choudhury can influence what 6 is played for him by the thumbs up and thumbs 7 down. So that even if Mr. Choudhury and Mr. 8 Klaus both pick the Lumineers through their 9 thumbs up and thumbs down, they actually have 10 somewhat different radio stations. They would 11 both have the Lumineers, but they'd hear 12 different things based on what they liked and 13 what they didn't like.</p> <p>14 And Pandora allows you not only to 15 keep -- to create a radio station by the name 16 of an artist, but you can also create a radio 17 station by the things you like to do, the music 18 you like to listen to when you're engaged in a 19 certain activity, because we all have certain 20 music we like in one setting and then maybe 21 different music that you like in a different 22 setting.</p> <p>23 And so this is what Pandora allowed 24 Mr. Choudhury to do. He created a radio 25 station for his barbecues and for his working.</p>	45	<p>1 music, and what that means is that you can get 2 Pandora virtually everywhere.</p> <p>3 Here is a slide. This is a slide 4 that actually was created by Pandora for -- I 5 think for an investor presentation. And you 6 see Pandora everywhere in quotes because that's 7 a campaign that Pandora has established, and 8 they're telling the consumer you can get 9 Pandora everywhere. When you wake up in the 10 morning, you can listen to whatever station you 11 want to listen to in the morning, and while 12 you're drive to work, and at work, and when 13 you're driving home and when you get home in 14 the evening. Pandora is everywhere. You can 15 use it day and night. And this strategy that 16 they have, that people should use Pandora 17 everywhere, is working.</p> <p>18 As you see, more and more users are 19 spending more and more time with Pandora. 20 That's what's happening. And, of course, that 21 means that they're spending less and less time 22 and less and less money on CDs and downloads. 23 And you see that happening, too.</p> <p>24 Now, let me go to iHeart. Let's 25 talk about iHeart. IHeart, which used to be</p>

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46	<p>1 called Clear Channel, and you'll see in the 2 documents that it's mostly referred to as Clear 3 Channel because they only changed their name, I 4 think, last year. They are the largest owner 5 of terrestrial radio stations in America; AM 6 and FM radio stations. They own a lot of them 7 all over the country.</p> <p>8 And they then take those radio 9 stations and they simulcast them. They make 10 them available on the Internet for people to 11 listen to it. There are Terrestrial radio 12 stations on the Internet.</p> <p>13 So when you go to iHeart, it looks 14 something like this. You can say, I want to 15 listen to country music, which -- what are your 16 country music radio stations?</p> <p>17 And there are your country music 18 radio stations, and you can pick which one you 19 want to listen to. And so even though you may 20 be in Washington, D.C., you can listen to 21 Dallas or you can listen to Minnesota or New 22 York. You can listen to whatever radio station 23 you want. But iHeart realized this isn't where 24 consumers are going. Consumers want something 25 more personalized than just whatever an AM or</p>	48	<p>1 in, enter the name, and immediately be sent to 2 where that track is playing. So it's almost 3 on-demand. Almost on-demand.</p> <p>4 Now, iHeart also has a customized 5 radio service, and this is an example of its 6 customized radio service. So you could 7 create -- Mr. Choudhury could go to iHeart's 8 customized service and do exactly what I just 9 showed you he did on Pandora where you can 10 start with Katy Perry and through your thumbs 11 up and thumbs down create a Katy Perry radio 12 station and all of the other radio stations.</p> <p>13 Now, iHeart also offers customized service.</p> <p>14 Now, let me talk about Spotify.</p> <p>15 Spotify is not statutory. It has a premium 16 on-demand service. It has a free on-demand 17 service, something it calls mobile shuffle, and 18 it's custom radio service. Let me start with 19 its on-demand service. The on-demand service, 20 -- if we can go to the next slide -- this is 21 what happens: You can create a Katy Perry -- 22 in Spotify, you wouldn't call it a radio 23 station. You'd call it a playlist. And what 24 you can is create a Katy Perry playlist. And, 25 basically, what you can do is pick your</p>
47	<p>1 FM radio station is playing.</p> <p>2 And so iHeart did something to their 3 simulcast service. What they did is this. 4 This is the iHeart simulcast service. And you 5 will see at the very top there's a search bar 6 there, and you see that I typed in Madonna. 7 And what iHeart does is when you type in 8 Madonna, they immediately take you to radio 9 stations that are now playing Madonna. So I 10 can't see -- but I think it's La Isla Bonita is 11 in -- playing in Los Angeles and Vogue is 12 playing in Savannah, Georgia. And so you can 13 sit there and immediately click on one of those 14 two stations and you will hear that track by 15 Madonna.</p> <p>16 JUDGE STRICKLER: Can I interrupt 17 you a second, Mr. Pomerantz?</p> <p>18 Will your witnesses testify that 19 when you click on the now playing button that 20 you join the song in progress?</p> <p>21 MR. POMERANTZ: Yes, I believe 22 that's how it works. I believe that's how it 23 works.</p> <p>24 And so what this allows the users to 25 do is to find an artist that they're interested</p>	49	<p>1 favorite Katy Perry tracks and you can list 2 them in whatever order you want, and if you 3 want to put some other artists that you like 4 along with Katy Perry, you can add them to the 5 list, as well. And that's your Katy Perry 6 playlist.</p> <p>7 And then you can do the same thing 8 for those other artists, Lumineers, and 9 Bleachers, and Fun, and you can create a 10 barbecue mix and you can create a driving mix, 11 and you can create all of those.</p> <p>12 Now, it's a little different because 13 you're creating -- you're picking the 14 particular tracks. But the way consumers use 15 it is very similar. They pick up their phone 16 and they say, I want to listen to Katy Perry. 17 I'm going to go to my Katy Perry playlist. For 18 Pandora, you would go to your Katy Perry radio 19 station. Not exactly the same, but very close 20 from the consumer experience.</p> <p>21 Same thing with barbecue music or 22 driving music. Again, not exactly the same, 23 but the consumers are creating playlists, 24 they're creating radio stations, and that's how 25 they're getting to their music so that they</p>

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<p style="text-align: right;">50</p> <p>1 have a group of songs that's tailored to what 2 they love. That's what Spotify is doing with 3 its on-demand service. 4 Now, the on-demand service has a 5 paid component where you pay a subscription and 6 a free subscription. If you pay the 7 subscription which is 9.99 a month right now, 8 it's come down. It was 15.99, 12.99. Right 9 now, Spotify's price is 9.99. What you get is 10 no advertisements and you can listen to it on 11 your desktop or on your mobile device. 12 You can also use Spotify's on-demand 13 service for free. There's two significant 14 differences. One is you have to listen to ads, 15 and the other is you can't take it on your 16 mobile device. It's only available on your 17 desktop. So that's Spotify's on-demand 18 services. 19 Now, Spotify also has other services 20 and they have a custom radio service. This is 21 basically exactly the same as iHeart and 22 Pandora. You can see the same playlist. It's 23 radio, so it's not on-demand. You basically 24 say what -- who you want, Spotify will deliver 25 the -- that artist or music from artists who</p>	<p style="text-align: right;">52</p> <p>1 given you three examples. There's, obviously, 2 a lot more statutory services out there and a 3 lot more interactive services out there, but I 4 have given you examples of the three largest 5 players out there in the market. 6 So I would now like to turn to the 7 benchmarks that you're going to hear about in 8 this proceeding. Here are the benchmarks, at 9 least the primary benchmarks that are proposed 10 by each of the participants. We point to the 11 interactive agreement, the agreement between 12 record companies and interactive services as 13 our primary benchmarks. We believe also that 14 the agreement between Apple and Sony and Apple 15 and Warner fully corroborate our benchmark. 16 iHeart primarily points to its 17 agreement with Warner. It also points to 18 agreements it has with some indies. Pandora 19 focuses on its agreement with Merlin and that's 20 its primary benchmark. NAB does not offer any 21 agreement as a benchmark of other ways of 22 trying to get to a rate proposal. And SiriusXM 23 also does not propose any agreement as a 24 benchmark. 25 So I would like to start with our</p>
<p style="text-align: right;">51</p> <p>1 they think are similar to that artist, and you 2 can thumbs up and thumbs down and create radio 3 station exactly the same way you do on Pandora 4 and iHeart. So Spotify also offers a custom 5 radio service to its customers. 6 And then, last, Spotify has what it 7 calls its mobile shuffle service. And this is 8 a new service. It came out in December of 9 2013. And what it does is it allows you to, on 10 your phone, use something that is sort of in 11 between fully on-demand and customized radio. 12 What you can do is you can pick certain songs 13 or certain albums and you have to have a long 14 enough list. So I don't remember an exact 15 list, but something like an hour or more of 16 songs. And then Spotify will shuffle those 17 songs. So you don't know which one you're 18 going to get in which order, but you've picked 19 what songs you listen to. And if you don't 20 pick enough songs, then Spotify fills in the 21 gaps with songs that they think you will like 22 based on the songs that you selected. And 23 that's a shuffle service. It's also free, and 24 it's available on your mobile device. 25 So those are examples -- I've only</p>	<p style="text-align: right;">53</p> <p>1 benchmark, the interactive agreements. You 2 will hear witnesses from major and independent 3 record companies, and they are going to 4 describe for you those agreements and the rates 5 and terms in those agreements. They're going 6 to explain to you the basic economics of the 7 interactive service agreements. They're going 8 to explain to you why they agreed to those 9 terms and they're going to explain to you their 10 expectations, what they thought when they were 11 going into the deal. 12 They're also going to explain to you 13 how the deals turned out. Did it meet their 14 expectations or not? 15 And they'll explain to you why those 16 interactive agreements explained how they would 17 look at a deal between that record company and 18 a Webcaster if there wasn't a statutory 19 license. It tells you something about the way 20 the parties look at an agreement that is 21 reached in the marketplace. 22 Professor Rubinfeld will then take 23 those facts, what the witnesses say and the 24 agreements, and he will do two things: He will 25 explain why the interactive service agreements</p>

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54	<p>1 provide a reasonable benchmark in this 2 proceeding, and he will also calculate rates 3 for the statutory license based on those 4 agreements. 5 I'm going to put the calculations to 6 one side and we'll deal with that this 7 afternoon, because you'll have to get into some 8 confidential information. 9 But Professor Rubinfeld will say 10 that there's three reasons why he thinks that 11 the interactive service agreements are good 12 benchmarks for Your Honor -- Your Honor to 13 consider in this proceeding. The first reason 14 is that there's a wide range of interactive 15 service agreements, and that ensures that the 16 benchmark is representative. 17 Up on the screen is a list of all of 18 the agreements that Professor Rubinfeld 19 considered in establishing his interactive 20 service benchmark. And what you will see from 21 this list is that it involves big record 22 companies and independent record companies. 23 You will see there is agreements with Universal 24 Music, the largest record company. And there's 25 also agreements that Professor Rubinfeld</p>	56	<p>1 the statutory license. And I don't think it's 2 going to be disputed in this hearing that this 3 gives a big advantage to the interactive 4 service agreements because they are not nearly 5 as affected by the statutory license. They 6 aren't affected by the shadow of the statutory 7 license in the way that the benchmarks are that 8 are offered by the participants. 9 Here is some testimony from their 10 experts in this matter about this issue. 11 Professor Shapiro is on the top and he is the 12 economist for Pandora. And he says: "I agree 13 with Professor Rubinfeld that agreements signed 14 by statutory Webcasters are influenced more by 15 the availability of the statutory license than 16 are agreements signed by interactive services. 17 Professors Fischel and Lichtman are the experts 18 for iHeart. They said: "Admittedly, there is 19 a drawback associated with relying on evidence 20 from noninteractive licensing agreements. 21 These agreements were negotiated in the shadow 22 of the statutory rate." 23 The third reason Professor Rubinfeld 24 thinks that the interactive services provide 25 the best benchmark is because the differences</p>
55	<p>1 considered with Beggars, and with Secretly 2 Canadian, independent record companies. 3 And you will also see that he 4 considered a broad range of streaming services. 5 You have Spotify, a very now large established 6 service. You have services offered by big 7 corporations like Google and Amazon. You have 8 niche players like Classical Archives, and you 9 have small startups like Yonder. 10 And this depth and this breadth of 11 agreements provides you with the confidence 12 that the rates and terms are truly reflective 13 of what happens in a marketplace. It's not 14 just a one-off aberration. You have confidence 15 that no one agreement is aberrational when you 16 can look at such a broad range of agreements 17 that are reached in the back and forth of the 18 marketplace. 19 Now, the second reason that 20 Professor Rubinfeld thinks that the interactive 21 service agreements are the most reasonable 22 benchmark is because they're less affected by 23 the statutory license. These services want to 24 offer some on-demand features, as well as 25 others; and, therefore, you can't just rely on</p>	57	<p>1 between an interactive service agreement and a 2 noninteractive -- an agreement that a 3 noninteractive service have reached can be 4 quantified and accounted for. And you will 5 see there will be a lot of discussion about the 6 interactivity interests. And I know Your 7 Honors are familiar with that. It can be 8 quantified and it can be accounted for, and 9 Professor Rubinfeld does so. And we'll discuss 10 that a little bit more this afternoon in the 11 confidential portion. 12 Now, I do want to respond directly 13 to some of the issues that Your Honors raised 14 in your Web III remand decision about the 15 interactive service benchmark that was used in 16 that case -- in that proceeding. There you 17 raised four concerns about the interactive 18 service benchmark, and we think we have 19 addressed each of those concerns. It's up on 20 the screen behind you. 21 We analyzed the ad-supported side of 22 the streaming market. We incorporated the 23 indie deals into our benchmark analysis. We 24 based our proposal on the most recent year of 25 data to account for the downward trends in the</p>

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58	<p>1 rates. And we supported our interactivity 2 adjustment with a conjoint survey, not a 3 hedonic regression. 4 Let me explain the moment on the 5 conjoint survey. It was designed by Professor 6 Daniel McFadden, and you will meet Professor 7 McFadden in this proceeding. Professor 8 McFadden won the Nobel Prize in economics for 9 his work related to consumer choice. And it's 10 that expertise that we're drawing upon in the 11 conjoint survey. His conjoint survey analyzes 12 how consumers value interactivity and other 13 features of a streaming service. We'll present 14 that evidence in our direct case. You will 15 hear from Professor McFadden later this week. 16 Now, the services have raised 17 challenges to our reliance on the interactive 18 service agreements. Quite a lot of challenges. 19 I don't have time to address all of them this 20 morning, but I do want to go through one of 21 them. We'll get to the rest of them during the 22 course of the next five weeks. 23 The servicers' economists argue that 24 the interactive service agreements were not 25 negotiated in an effectively or workably</p>	60	<p>1 or workable competition or competition, we will 2 show you that the market for licensing 3 recordings through interactive services is 4 competitive. 5 Here is the basic premise of the 6 servicers' argument. They say streaming 7 services must have the catalogs of the three 8 major record companies to be successful. You 9 need to have all three catalogs, the three 10 major ones. And they say a market can't 11 possibly be competitive if there are must-have 12 subscribers. That's their argument. 13 Well, we don't dispute, at least, 14 the first part. That is to say we think the 15 major record companies may be must-have 16 suppliers for at least some streaming services. 17 But we very strongly disagree with the second 18 part of it. Just because there are must-have 19 suppliers does not mean that the market is 20 automatically not competitive. You have to 21 look at the market. You have to look at the 22 factors in the market and see how the market is 23 operating. You can't just jump to that 24 conclusion. 25 Now, when Universal acquired EMI,</p>
59	<p>1 competitive market. One expert says 2 effectively competitive, the other one says 3 workably competitive. I think they both agree 4 that they are referring to the same thing. And 5 they tell you that because the market was not 6 workably competitive or effectively 7 competitive, you should just disregard those 8 agreements. 9 Now, the board has mentioned 10 effective competition in some of its earlier 11 decisions. I don't think the board has 12 provided what they would consider to be a hard 13 and fast definition what effective competition 14 is. But you certainly have given us some 15 indication of some factors that should be 16 considered. Whether the buyer or the seller 17 there is a pricing. Whether negotiations 18 between the parties are merely superfluous or 19 whether they're really meaningful. Whether the 20 negotiated rates approximate a monopoly. 21 Whether there are sufficient competitive 22 factors in the marketplace. Those are examples 23 of some of the factors. 24 We will show you that no matter what 25 definition you apply of effective competition</p>	61	<p>1 which was then the fourth major record company, 2 when Universal acquired EMI back in 2012, the 3 transaction was reviewed by the FTC. And 4 Universal told the FTC that the major record 5 companies are must-haves for some streaming 6 services. I was counsel for Universal in that 7 transaction, in that merger, and Professor 8 Rubinfeld was Universal's economist in that 9 transaction. 10 What Professor Rubinfeld believed 11 back in 2012 was that the majors were 12 must-haves for most streaming services, and he 13 also believed that the market facts showed that 14 the licensing for streaming services was 15 competitive. Was very competitive. And he 16 still believes both of those things today. The 17 majors are must-haves and the market is 18 competitive. And he believes those things for 19 several reasons. And I'll just briefly mention 20 a few of them now and then we'll hear testimony 21 over the course of the next week or two. 22 First, the record companies' ability 23 to set rates for interactive services is 24 significantly affected by the free alternatives 25 that are available to consumers. Consumers</p>



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62	<p>1 have a lot of free alternatives available to 2 them. One of those free alternatives is 3 Internet piracy, and we've all heard about the 4 ability to get music for free from pirate 5 services that don't pay for the music. And 6 this has, obviously, greatly affected consumer 7 demand for legitimate music when so much 8 illegitimate music is available. 9 This is what has happened to the 10 revenue of the record industry in the last 20 11 years. And what you see is that it hit its 12 peak in 1999 and has been declining ever since. 13 And in 1999 is when NAPSTER entered the market. 14 And what has happened to the record industry is 15 that sales of legitimate music has gone down 16 because so many people are turning to the 17 illegitimate music that are available through 18 pirate sources. 19 And so for a music distributor like 20 Wal-Mart or like the iTunes downloads or like 21 Spotify subscription services, they've all had 22 to lower their retail price to compete with an 23 illegitimate competitor, someone who's offering 24 exactly the same product, the same music, but 25 for free, and they don't have to pay for it.</p>	64	<p>1 YouTube. YouTube is being used as a music 2 streaming service by millions and millions and 3 millions of Americans. You can go onto 4 YouTube, find a video of Journey's greatest 5 hits and listen to all of journey's greater 6 hits for free, and there's very little that the 7 record companies can do about it because that 8 music has been uploaded by a user. And under 9 the DMCA Safe Harbors, it's very little the 10 record companies can do about it. 11 So that's another free alternative 12 that consumers can access, and that affects 13 what the record companies can charge its 14 streaming services. 15 Now, second, what you're going to 16 see is documents that show the negotiations 17 between a record company and an interactive 18 service, Spotify. And what -- or other 19 interactive services. And you're going to see 20 those documents do not show where a must-have 21 supplier is dictating the price to the 22 streaming services. That is not what happens 23 in the real world, and that tells you that 24 there is competition going on even though a 25 catalog of a major is a must have for a</p>
63	<p>1 And Spotify is an example. Started 2 out with a 15.99 subscription price. Consumers 3 weren't going there because they can get the 4 music for free. So they lowered it to 12.99 5 and then 9.99. That's what it is today. And, 6 of course, as the retail price has gone down, 7 the record companies have to lower their price 8 in order to -- in order to -- for the 9 distributors to lower their prices to the 10 consumer. And that's what's happened. Record 11 companies have lowered their prices to 12 distributors, including to interactive 13 streaming services because of what's going on 14 at the consumer level. Consumer demands. 15 And Professor Shapiro, Pandora's 16 expert economist, he agrees with that. Here's 17 what he said in his testimony. He said: "The 18 rates paid by interactive services have been 19 falling as a result of competition from 20 piracy." That greatly affects what record 21 companies can do as the wholesale level, at the 22 price that they're charging to interactive 23 services. They are not a price maker. 24 There's another free alternative out 25 there and that's extremely popular, and that's</p>	65	<p>1 streaming service. 2 The services do push back. The 3 services do get concessions. And I will review 4 a few examples of that this afternoon because 5 they're confidential documents. 6 Third, what Professor Rubinfeld will 7 point out is that subscriptions -- streaming 8 services are absolutely critical to the 9 long-term health of the record companies. 10 Record companies make more money when a user 11 subscribes to Spotify than if they stream from 12 Pandora or if they take it for free from a 13 pirate service or from YouTube. It's in their 14 interest to have subscribers go to Spotify. 15 And so yes, of course, Spotify needs the 16 catalogs of the majors, but the majors also 17 need Spotify. It's the largest subscription 18 streaming service out there and it's vital to 19 the survival of the record industry. We want 20 consumers to subscribe so they're paying for 21 music instead of taking it for free. And, of 22 course, Spotify -- that gives Spotify 23 bargaining power. There is bargaining power on 24 both sides of that negotiation. 25 And, finally, even if the majors do</p>

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<p style="text-align: right;">66</p> <p>1 have some bargaining power, whatever that is, 2 because of their must-have status with a 3 streaming service, they would have the same 4 bargaining power with respect to a 5 noninteractive service in the hypothetical 6 world where there isn't a statutory license. 7 Because the major catalogs -- the catalogs of 8 the majors are also -- are also going to be 9 must-haves for the noninteractive services. If 10 Pandora were missing all of Universal's record 11 company, that would affect Pandora. They're 12 going to want Universal, and, therefore, it's 13 going to affect the negotiation that Universal 14 has with Pandora. 15 Let me briefly turn, if I may, to 16 some of the other benchmarks that you're going 17 to see, and that was the interactive service 18 benchmarks. I want to talk briefly about 19 Apple. Apple's agreements with Sony and 20 Warner, that Your Honors know about because 21 there has been some litigation of those in the 22 motion practice, they are another benchmark. 23 iTunes is ad support, iTunes radio, 24 just like Pandora, just like iHeart. And it's 25 not on-demand, just like Pandora and just like</p>	<p style="text-align: right;">68</p> <p>1 largest customer. 2 So there is no -- I don't believe 3 there's going to be any other argument that 4 those agreements lacked effective competition. 5 We'll look at the economics of those deals 6 later this afternoon. 7 iHeart is going to turn to the 8 agreement that they have with Warner. And, 9 again, I'll save some of my comments about that 10 deal for this afternoon because we should put 11 that with the deal terms. But what you're 12 going to see in the iHeart deal -- I just want 13 to get a few points right now. You're going to 14 see that iHeart provided Warner with a certain 15 piece of consideration that it couldn't 16 possibly provide to all of the other record 17 companies. It couldn't. It's the way that the 18 consideration works. It can only be provided 19 to less than all the record companies. And, 20 yet, the rates that were agreed upon were 21 specifically derived from that unique or 22 unusual consideration. 23 Since iHeart can't provide that same 24 consideration to all other record companies, 25 you really can't look at that deal as something</p>
<p style="text-align: right;">67</p> <p>1 iHeart. So they can't distinguish it on that 2 basis like they try to do with the interactive 3 services. 4 But even though the iTunes radio 5 service is ad supported and not on-demand, its 6 rates and terms in the agreements are much 7 closer to what SoundExchange is proposing than 8 what the servicers are proposing. And that 9 shows you what's happening in the market. And 10 if that's going to be true no matter when you 11 look at what Apple and Sony and Warner thought 12 going into the deal, that is what their 13 expectations were or whether you look at it in 14 terms of what actually occurred. Either way, 15 the rates that are derived are much closer to 16 what SoundExchange is proposing than what 17 servicers are proposing. 18 And I don't think the servicers are 19 challenging the Apple agreement as being 20 reached in an environment where there wasn't 21 effective competition. The record companies 22 are sitting across the table from Apple. No 23 one has a lot of bargaining power when you sit 24 across the table from Apple, and particularly 25 the record companies, because Apple is their</p>	<p style="text-align: right;">69</p> <p>1 that is a basis for an industry-wide license 2 for a license that would apply to all record 3 companies equally because all record companies 4 have to license their music pursuant to the 5 statutory license. 6 Second, there is no question that 7 the shadow of the statutory license greatly 8 affected the negotiations between iHeart and 9 Warner. iHeart and Warner both knew that if 10 they didn't reach a deal, iHeart could just 11 keep using Warner's music pursuant to the terms 12 of the statutory license. And that policy 13 makes a fundamental difference in the dynamic 14 of the negotiation. 15 Third, you will see that iHeart's 16 experts made a very serious error in the way 17 that they calculated and analyzed the deal. 18 They only looked at a portion of the streams -- 19 of Warner streams that are used under the deal, 20 what they call the incremental streams. And 21 we'll show that that's not the right way to 22 look at it, and you really have to look at all 23 the streams and all of the consideration 24 provided in this agreement. 25 And then there's Pandora's deal with</p>

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70	<p>1 Merlin. That's their primary benchmark. 2 Merlin is an agent for a group of independent 3 labels. They negotiate on their behalf with 4 digital services, and they -- the agreement 5 between Merlin and Pandora was signed on June 6 16th, 2014, four or five months after this 7 proceeding started and just a few months before 8 the direct testimony was submitted. And before 9 this deal was reached, Pandora was using the 10 music of the labels of Merlin pursuant to 11 what's called the Pure Play. And the Pure Play 12 agreement is an agreement that was reached 13 under Webcasters Settlement Act. I understand 14 this is not the time to engage in any legal 15 arguments, so I will put that aside, and what 16 we have proposed is simply to provisionally 17 admit evidence relating to the Pandora-Merlin 18 deal and the Pure Play deal so that Your Honors 19 can later consider whether the Pandora-Merlin 20 deal can even be considered as a benchmark in 21 this proceeding under the Webcaster's 22 settlement. 23 But what you will see is that, on 24 the facts, is that Pandora's relying just on 25 one agreement. They're not relying on any</p>	72	<p>1 negotiate lower rates in order to avoid such 2 steering. And that's not what's going to 3 happen if there wasn't a statutory license. 4 First, the record companies would 5 negotiate provisionals so that they aren't 6 discriminated against by some steering within 7 the algorithm. But, also, Pandora is going to 8 get slammed in the marketplace. 9 What do you think iHeart and iTunes 10 radio is going to do if the world starts 11 knowing that Pandora is steering towards music 12 that costs them less? 13 Think of the advertising campaign. 14 Pandora gives you the cheapest music. We give 15 you what you want to hear. What's that going 16 to do? 17 If the consumer knows that Pandora 18 is delivering music based on price and not 19 based on taste, what's going to happen in the 20 marketplace? 21 And you know these are competitors. 22 They're going to go after each other. So I 23 think you will find that steering is not a 24 super bullet for many reasons. 25 Let me briefly talk about NAB. We</p>
71	<p>1 agreement between a service and a major record 2 company. They're not relying on any agreement 3 between a record company and any service other 4 than Pandora. Just Pandora and Merlin. And 5 what we're going to show you is that is not a 6 representative agreement and you will not have 7 the same confidence that what you're really 8 seeing is something that would reflect market 9 rates. 10 Third, if the Pandora-Merlin 11 agreement is admissible, you'll see how greatly 12 affected the terms are by the Pure Play 13 agreement. You will see that the Pure Play 14 agreement has dictated many of the terms, 15 including the core economics of the deal. 16 And, finally, you'll hear Pandora's 17 witnesses talk a lot about something called 18 steer up. And what they will say is that they 19 can manipulate that Pandora algorithm so that 20 it will deliver to Mr. Choudhury only music 21 that's cheaper than other music, so that they 22 can save money. So he will get music that 23 costs them less. And they think that because 24 they can steer to cheaper music, that the 25 record companies, in turn, will therefore</p>	73	<p>1 didn't offer any benchmark agreement. Instead, 2 what NAB does is they point to two different 3 things out there in the market -- not in the 4 market, out there in the world, that they think 5 create a zone of reasonableness; low end and a 6 high end. And the first thing they point to is 7 terrestrial rating. And what they say, and 8 through their economist, Professor Katz, is 9 that terrestrial radio is a lower bound for the 10 zone of reasonableness, and that lower bound is 11 zero. And the reason why it's zero is because 12 over-the-air broadcasters pay zero for use of 13 sound recordings. But we all know why they pay 14 zero. It's because the U.S. copyright laws do 15 not provide a public performance right for 16 sound recordings used over the air. So radio 17 stations are paying zero because that's the 18 law, not because some market has driven it to 19 zero. So the terrestrial radio doesn't tell us 20 anything about what a willing buyer and willing 21 seller would agree to if there wasn't a 22 statutory license. 23 And then they look to the SDARS II 24 decision to create, I think, the upper bound of 25 their zone of reasonableness. But the SDARS II</p>

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74	<p>1 decision, the decision of this board, it's not</p> <p>2 a market agreement between a willing buyer and</p> <p>3 a willing seller. And it's not only a decision</p> <p>4 of this board, but it's a decision of this</p> <p>5 board under an entirely different standard than</p> <p>6 what applies in this proceeding. And it's not</p> <p>7 only a decision of this board under a different</p> <p>8 standard, but it's a decision about an entirely</p> <p>9 different type of service that involves very</p> <p>10 different economic considerations of satellite</p> <p>11 radio.</p> <p>12 Now, I have not yet directly</p> <p>13 addressed issues of promotion and substitution;</p> <p>14 but, of course, the statute asks you to</p> <p>15 consider those things. It's hard wired right</p> <p>16 into the statute. But the market has already</p> <p>17 given us the answer to promote substitution</p> <p>18 because economists on both sides will say, and</p> <p>19 this board has previously said, that benchmark</p> <p>20 agreements reached within the marketplace</p> <p>21 already factor the promotional and</p> <p>22 substitutional effects into the terms of those</p> <p>23 agreements. The record companies and the</p> <p>24 services think about those things when they set</p> <p>25 the economic terms.</p>	76
75	<p>1 So the promotional and</p> <p>2 substitutional effects are already in the terms</p> <p>3 of the interactive service agreements that we</p> <p>4 rely on, and they're already in the agreements</p> <p>5 between Apple and Warner and Sony. And they're</p> <p>6 already in the Pandora-Merlin deal and the</p> <p>7 iHeart/Warner deal. But the servicers are</p> <p>8 raising one other argument that I think will</p> <p>9 cause some additional evidence to come in</p> <p>10 beyond just the agreements themselves. What</p> <p>11 they say is that statutory Webcasters are more</p> <p>12 promotional than interactive services like</p> <p>13 Spotify; and, therefore, you need to make</p> <p>14 another adjustment from the interactive</p> <p>15 services to adjust for the fact that the</p> <p>16 Webcasters are more promotional.</p> <p>17 Well, we will show that they are</p> <p>18 just wrong. Remember what their game plan is.</p> <p>19 Remember Pandora's game plan. Remember,</p> <p>20 they're going to put Pandora everywhere.</p> <p>21 They're going to make sure that consumers are</p> <p>22 listening to Pandora morning, noon and night.</p> <p>23 This is not a game plan for</p> <p>24 promotion. It's not a game plan to say to</p> <p>25 users of Pandora go buy a CD or go by a</p>	77
	<p>1 download. It's not saying go subscribe to</p> <p>2 Spotify. What this is saying is substitute for</p> <p>3 all those things because we're going to give</p> <p>4 you the music you want morning, noon and night.</p> <p>5 Now, of course, we all know that it's working.</p> <p>6 Pandora is really, really popular. And so</p> <p>7 you're getting 20 billion hours of music</p> <p>8 streamed through Pandora just last year.</p> <p>9 There's a particular aspect of</p> <p>10 promotion that the evidence from the servicers</p> <p>11 almost entirely miss and that's -- and</p> <p>12 promotion and substitution, and that is the</p> <p>13 effect of a Webcaster on the revenue stream to</p> <p>14 Spotify and to other interactive services.</p> <p>15 Does Pandora and iHeart substitute</p> <p>16 for Spotify and other interactive services?</p> <p>17 They want you to focus on CDs and</p> <p>18 downloads, and that's relevant, but so is the</p> <p>19 substitution of the revenue stream that would</p> <p>20 otherwise go to Spotify and to other</p> <p>21 interactive services.</p> <p>22 We asked our survey expert, Sarah</p> <p>23 Butler, to look at that question, to look at</p> <p>24 whether Pandora is substituting for Spotify,</p> <p>25 for interactive services, for FM radio. What</p>	
	<p>1 is it substituting for?</p> <p>2 And Ms. Butler has done a lot of</p> <p>3 market studies, and you will meet her in our</p> <p>4 case. And she designed a survey that asked</p> <p>5 these questions about -- to Pandora users.</p> <p>6 And, by the way, she did the same thing to</p> <p>7 iHeart.</p> <p>8 The first question: Imagine you can</p> <p>9 no longer listen to music on Pandora. Which of</p> <p>10 the following statements represents what you</p> <p>11 would be most likely to do?</p> <p>12 And if they picked the substitution,</p> <p>13 the substitute number one, she asked Question</p> <p>14 3. You said you would find a substitute for</p> <p>15 the music you listen to on Pandora. Which of</p> <p>16 the following, if any, would be your most</p> <p>17 preferred substitute for Pandora? And she then</p> <p>18 gives them 24 different alternatives.</p> <p>19 What would you do if Pandora didn't</p> <p>20 exist? What would you do to satisfy your music</p> <p>21 interest and needs?</p> <p>22 And this -- these are the results.</p> <p>23 The number one answer was Spotify. Almost 20</p> <p>24 percent of one in five said they would go to</p> <p>25 Spotify, and you can see where the rest of this</p>	

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78	<p>1 comes out. And what this tells you is that</p> <p>2 Pandora is substituting for Spotify and for a</p> <p>3 bunch of other alternatives that are more</p> <p>4 valuable to the record industry than Pandora.</p> <p>5 JUDGE STRICKLER: Do you know, Mr.</p> <p>6 Pomerantz, whether she will testify with regard</p> <p>7 to the first line with regard to Spotify,</p> <p>8 breaking down that 19.7 percent between free</p> <p>9 Spotify and paid Spotify?</p> <p>10 MR. POMERANTZ: No, she will not.</p> <p>11 But what you will have is the conversion from</p> <p>12 free to paid by Spotify. Spotify is what's --</p> <p>13 what is referred to in the industry as a free</p> <p>14 service. And like in other industries, what</p> <p>15 the concept is, is get people into the free,</p> <p>16 and then upsell them to the paid service. And</p> <p>17 there is a percentage. I believe it's 20</p> <p>18 percent, in that range, where Spotify is</p> <p>19 converting users from free to paid. So the</p> <p>20 concept here of Spotify and of the premium</p> <p>21 model that's not just Spotify, but many</p> <p>22 streaming services, get them into free, get</p> <p>23 them to really like the service, don't love the</p> <p>24 ads, want to take it mobile, and so you upsell</p> <p>25 them to the paid service.</p>	80	<p>1 not the actual terms, so I shouldn't disclose</p> <p>2 it anyway. But if Spotify only converts, let's</p> <p>3 say, 5 percent or less of its free users to</p> <p>4 pay, your per-play rate, let's say, is \$0.30.</p> <p>5 But if you convert five or 10 percent, it goes</p> <p>6 down to \$0.28. If you convert 10 to 20</p> <p>7 percent, it goes down to \$0.26.</p> <p>8 And so what the record companies are</p> <p>9 trying to do is to incentivize Spotify to move</p> <p>10 users from free to paid. It's also in</p> <p>11 Spotify's self interest to do so. But the</p> <p>12 record companies are building an additional</p> <p>13 economic incentive into their contracts for</p> <p>14 premium services.</p> <p>15 JUDGE STRICKLER: Thank you.</p> <p>16 MR. POMERANTZ: We will also offer</p> <p>17 testimony from Dr. Blackburn that is relevant</p> <p>18 to the issue of substitution of programming and</p> <p>19 promotion. He analyzed data that was provided</p> <p>20 by iHeart. iHeart examined the same data and</p> <p>21 they had -- and they offered direct testimony</p> <p>22 on it from Professor Danifer. Professor</p> <p>23 Danifer then realized that he actually had not</p> <p>24 analyzed the data correctly, and that -- and so</p> <p>25 he went back and he corrected his testimony.</p>
79	<p>1 JUDGE STRICKLER: Will Ms. Butler</p> <p>2 testify that all that information about that</p> <p>3 conversion from free to paid was given to the</p> <p>4 individuals in the survey, or no?</p> <p>5 MR. POMERANTZ: I don't believe it</p> <p>6 was. I can't be certain. I believe it was not</p> <p>7 provided to them. So this is based upon what</p> <p>8 the consumer -- I should -- I think it was</p> <p>9 based on what the consumer would have</p> <p>10 understood about Spotify. So you know what</p> <p>11 you've heard about Spotify. If you haven't</p> <p>12 heard about it, you may not know about it.</p> <p>13 Okay. So you have to identify what</p> <p>14 you've heard about it. So this would not be</p> <p>15 asked of someone who has not heard about</p> <p>16 Spotify. It would only be asked of someone who</p> <p>17 has, and you're going to get a list here of the</p> <p>18 ones you actually heard, and that's the way she</p> <p>19 organized her study.</p> <p>20 But -- and what's important about</p> <p>21 that conversion, methodology of -- or model of</p> <p>22 Spotify is that when a record company enters</p> <p>23 into a contract with premium service like</p> <p>24 Spotify, it builds into the contract conversion</p> <p>25 incentives. So if Spotify -- unless -- this is</p>	81	<p>1 And when he corrected his testimony, he</p> <p>2 specifically said that the data, now that he</p> <p>3 realizes it, doesn't show any meaningful</p> <p>4 difference between the promotional effects of</p> <p>5 noninteractive services and the promotional</p> <p>6 effects of interactive services. And so he</p> <p>7 submitted his corrected testimony to correct</p> <p>8 that. Very important correction.</p> <p>9 Thereafter, iHeart decided his</p> <p>10 testimony doesn't really help us, so they</p> <p>11 withdrew Professor Danifer's testimony.</p> <p>12 So we asked Dr. Blackburn to go</p> <p>13 analyze the same data, and he did. He did a</p> <p>14 regression analysis of the same data; and, of</p> <p>15 course, he came to the same conclusion. The</p> <p>16 data does not show a meaningful difference</p> <p>17 between the promotional effects of a</p> <p>18 noninteractive service and the promotional</p> <p>19 effect of an interactive service.</p> <p>20 CHIEF JUDGE BARNETT: Mr. Pomerantz,</p> <p>21 you might want to know you've been going for an</p> <p>22 hour and ten minutes.</p> <p>23 MR. POMERANTZ: Okay. I will try to</p> <p>24 wrap it up.</p> <p>25 The participants' own behavior also</p>

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<p style="text-align: right;">82</p> <p>1 shows the -- something about the promotional 2 and substitutional effects of these services. 3 What the servicers are going to say is that 4 record companies try to get their music played 5 on terrestrial radio, and that shows that 6 terrestrial radio is promotional. They spent a 7 lot of money to try to convince terrestrial 8 radio to play new releases. They put a lot of 9 effort behind it, but that -- and that's true. 10 Other companies do try to get terrestrial radio 11 stations to play their music. And many people 12 at record companies believe that that helps to 13 sell CDs and downloads. We're not here to 14 claim otherwise. 15 But that evidence actually proves 16 exactly the opposite of what the servicers are 17 using it for. Because what you will see is the 18 record companies do not spend a lot of money or 19 put a lot of resources to try to get Pandora or 20 iHeart to play the music. So if the 21 expenditure of money and resources shows what 22 the record companies think, then their own 23 behavior would show that they don't think it's 24 very promotional to have Pandora play their 25 music.</p>	<p style="text-align: right;">84</p> <p>1 actual behavior of the Webcasters also tells 2 you something about promotion and substitution 3 because what it shows you, if you look at Tabs 4 3 through 6, is that Pandora and iHeart are 5 viewing Spotify as a significant competitor. 6 They're competing for the same listeners. 7 They're trying to get listeners to go back and 8 forth with each other. That's what good 9 competitors do, they try to take customers away 10 from each other. And that's what these 11 documents show. These are Pandora's and 12 iHeart's internal documents. They view each 13 other as competitors. 14 So when you're sitting there 15 thinking about the statutory factor of whether 16 Webcasters are interfering with other revenue 17 streams, these documents tell you that Pandora 18 and others are interfering with the revenue 19 streams that would otherwise come from 20 interactive services. 21 Briefly, a note about price 22 discrimination. I'm sorry. I actually skipped 23 the simulcasters -- well, skipped Slide 69 and 24 70, and 71. Price discrimination. We are not 25 proposing any price discrimination. You raised</p>
<p style="text-align: right;">83</p> <p>1 Now, I handed you a binder with some 2 documents in it. I just want to point you 3 quickly to the first two documents. And these 4 are documents that both come from Sony decks, 5 internal decks here. And just take a quick 6 moment to scan Tab 1 and Tab 2. 7 And I'll tell you that the way I 8 read Tab 1 and Tab 2 is that they're 9 fundamentally inconsistent. They say two 10 different things. In fact, I think they say 11 the opposite. And what that tells you is that 12 people inside the record companies don't always 13 see it the same way. And you would probably 14 expect that in a market that is rapidly 15 evolving as the music industry. 16 And so we will give you a chance to 17 meet Sony's witnesses. Tomorrow, Dennis Kooker 18 will be the first witness we call from Sony. 19 You will also meet a lot of other witnesses, 20 and you will be able to assess their 21 credibility. You will be able to see whether 22 they really believe that Pandora is or is not 23 promotional, and you will be able to make that 24 judgment yourself. 25 And what you'll also see is that the</p>	<p style="text-align: right;">85</p> <p>1 the issue in your initial reports. Pandora is 2 proposing a form of price discrimination. NAB 3 maybe is. 4 What Pandora is proposing is that 5 you should establish rates where ad-supported 6 services pay less than subscription services. 7 But we think there's a problem with that. We 8 think there are several problems. 9 First, creating the wrong 10 incentives. Lower rates for ad-supported 11 services would financially motivate a service 12 to go to ad support. You would be favoring one 13 business model over another. You would be 14 disfavoring another. And if you look at Tab -- 15 the last tab in your binder, it's an 16 internal -- it's an e-mail between Pandora and 17 Merlin in the negotiations. And you will see 18 that the Merlin -- the Pandora representative 19 is saying exactly this point. So you're 20 creating incentives that are going to distort 21 the marketplace. You have a financial 22 incentive to be ad-supported and not 23 subscription. 24 Second, that's not what would happen 25 in the but-for world where there was no</p>

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<p style="text-align: right;">86</p> <p>1 statute. The record companies would not give a 2 lower rate for ad support unless there was a 3 conversion incentive, an incentive to upsell to 4 the subscription services. But that's not what 5 Pandora is proposing. They're just proposing a 6 lower rate for an ad-supported service, and 7 that's not what would happen in the market. 8 And you can look at the benchmark agreements to 9 see that.</p> <p>10 And, finally, the statutory license 11 grants each licensee the same rights. It's up 12 to the licensee to decide what they want to do 13 with those rights. Are they going to use all 14 of them? Some of them? None of them? It's up 15 to the licensee to decide how they want the use 16 them and what model they want to offer. But 17 the license should be agnostic. The license 18 should let the licensee decide how much of 19 those rights they want to use and how they want 20 to use them.</p> <p>21 NAB offers their very, very low rate 22 of .0005 for simulcasters, like what I should 23 you on the screen. They don't say what they're 24 offering for non-simulcasters. They say we 25 don't take a position on that. But some of</p>	<p style="text-align: right;">88</p> <p>1 majority of the music.</p> <p>2 So what they're saying is that you 3 can take the terrestrial broadcast, switch out, 4 flip out 49.9 percent of that music and it 5 would still be a simulcast for rate purposes, 6 and they want a very low rate for simulcast.</p> <p>7 The revenue share that we propose, 8 we propose the revenue share of 55 percent, and 9 I think when you see the benchmark agreement 10 you'll see where we get it from and that it's 11 conservative. I would also note that out there 12 in the marketplace, companies like Netflix and 13 Amazon and Apple's download store, they all pay 14 70 percent, probably 70 percent of the revenue 15 to the content owners that supply them with the 16 content that they own. And we think we have 17 offered a definition of revenue that will work 18 for the license.</p> <p>19 Non-commercial Webcasters. We 20 believe that the non-commercial Webcasters, 21 first, is that most of them pay the minimum 22 fee, and we're not proposing any change in the 23 minimum fee. Same \$500 that it's been for 24 years. There's only one non-commercial 25 Webcaster, the NRB-NMLC that's provided you</p>
<p style="text-align: right;">87</p> <p>1 their arguments will suggest that they think 2 Pandora and other customized radio services 3 should pay more because the user gets to 4 influence the music much more so than in a 5 simulcast. And so that's what they're 6 proposing.</p> <p>7 Again, we think there's problems 8 with that. First of all, simulcasts are 9 subject to user influence, and I showed you the 10 Madonna example. And, second, you have the 11 same problems again. You're creating 12 incentives for a simulcaster not to get it, and 13 not to get it too personal because if you do 14 you cross the line and have to pay a higher 15 rate, and you'll have to define what is a 16 simulcast.</p> <p>17 Is Madonna a simul -- is that 18 Madonna example a simulcast?</p> <p>19 And here's another problem you will 20 have. If you look at iHeart's definition of a 21 simulcaster in their rate proposal, they say a 22 simulcaster, and the call it a broadcast 23 transition. But they're saying a simulcast is 24 anything that involves a majority of the music 25 in the same thing as on terrestrial radio. The</p>	<p style="text-align: right;">89</p> <p>1 with a rate proposal. And they sought to 2 change it so that there's three tiers of rates, 3 three levels. 500 up to 1,500 is the highest. 4 We don't see a reason for the change.</p> <p>5 If you have less than 159,000 6 aggregate tuning hours, you pay the minimum 7 fee. If you're above that you, you pay the 8 same per-play rate as commercial Webcasters. 9 That's what the board ordered back in 2010 and 10 we think that should continue.</p> <p>11 I will reserve my -- any further 12 comments having gone out, and quite long right 13 now, for this afternoon. And I thank you for 14 your attention.</p> <p>15 CHIEF JUDGE BARNETT: Thank you, Mr. 16 Pomerantz.</p> <p>17 We're going to take our morning 18 recess, which will be 15 minutes and try to -- 19 two 15 minutes, which means by the time 20 everybody gets out of the room, it will be time 21 to come back in.</p> <p>22 Before we do, may I assume you are 23 Mr. Johnson?</p> <p>24 MR. JOHNSON: Yes, Your Honor. I 25 apologize for being late.</p>

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90	<p>1 CHIEF JUDGE BARNETT: That's all</p> <p>2 right.</p> <p>3 Please stand and identify yourself</p> <p>4 for the court reporter.</p> <p>5 MR. JOHNSON: George Johnson from</p> <p>6 GEO Music in Nashville, Tennessee.</p> <p>7 CHIEF JUDGE BARNETT: Welcome.</p> <p>8 MR. JOHNSON: Thank you.</p> <p>9 CHIEF JUDGE BARNETT: And you can</p> <p>10 coordinate with Mr. Pomerantz regarding opening</p> <p>11 statement if you would like to give one.</p> <p>12 MR. JOHNSON: Yes.</p> <p>13 CHIEF JUDGE BARNETT: Okay. We will</p> <p>14 be at recess, then, for 15 minutes.</p> <p>15 (A short recess was taken.)</p> <p>16 CHIEF JUDGE BARNETT: Mr. Johnson,</p> <p>17 would you like to make an opening statement?</p> <p>18 MR. JOHNSON: Yes, I would, Your</p> <p>19 Honor.</p> <p>20 Good morning, Your Honor, and thank</p> <p>21 you for this opportunity to be here with you</p> <p>22 today, and my name is George Johnson.</p> <p>23 For the past 30 years, I have been</p> <p>24 an independent singer-songwriter in Nashville,</p> <p>25 Tennessee and Los Angeles, California, who</p>	92
91	<p>1 writes and composes his own music. It's a real</p> <p>2 privilege to be able to share my story with you</p> <p>3 in this great proceeding, it's the story of all</p> <p>4 American creators, and unfortunately, the story</p> <p>5 is tragic.</p> <p>6 For the past 15 years, whether you</p> <p>7 are young or old, just starting out,</p> <p>8 well-seasoned, independent or with a major</p> <p>9 label, streams have taken over the entire</p> <p>10 industry. Everything is set at .00 cents.</p> <p>11 There is no way for us to survive.</p> <p>12 Most importantly, I think we need</p> <p>13 your intervention and without your help, Your</p> <p>14 Honor, the story does not have a happy ending</p> <p>15 for 99 percent of the current and future</p> <p>16 American copyright creators, especially</p> <p>17 independent digital sound creators, who create</p> <p>18 both 114 and 115 copyrights, sometimes at the</p> <p>19 same time. So many incredible American</p> <p>20 singer-songwriters, producers and independent</p> <p>21 record labels throughout the decades made their</p> <p>22 own records, hit records, without the help or</p> <p>23 benefit of major recording labels.</p> <p>24 CHIEF JUDGE BARNETT: Excuse me.</p> <p>25 Can you pull that mic just a little bit closer?</p>	93
	<p>1 MR. JOHNSON: Sure. Sorry, Judge.</p> <p>2 These independents have a talent,</p> <p>3 business savvy and just enough money to help</p> <p>4 create the great American songbook, despite the</p> <p>5 royalty system the federal government has</p> <p>6 designed for them. In a way we independents</p> <p>7 are the foreign team, the minor league, the</p> <p>8 life blood of the music industry. We are being</p> <p>9 put out of business by streamers and, yes,</p> <p>10 three major labels, now all four known, in the</p> <p>11 most anticompetitive way possible and on</p> <p>12 purpose.</p> <p>13 Sadly, we have become -- come to the</p> <p>14 proverbial crossroads in the industry. Garth</p> <p>15 Brooks is correct, we're dealing with the</p> <p>16 devil, as he called it, YouTube streamers</p> <p>17 several months ago. Being the number one</p> <p>18 recording artist of all times who pointed out</p> <p>19 the heart of the matter, as he said on video, I</p> <p>20 think the thing is you have to put music first.</p> <p>21 The government has passed a lot of laws really</p> <p>22 quickly and allowed technology kind of just to</p> <p>23 use music as a tool without paying for it.</p> <p>24 And I would like to see the</p> <p>25 government revisit that, because music could</p>	



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94	<p>1 royalty system to make their money, using 2 loopholes and laws designed to help music 3 copyright creators to take control and extract 4 all the profits from our personal private 5 company, our copyrights. 6       One example is 37 CFR 385, it 7 enshrines the mechanical rate at 9.1 cents for 8 115 underlying works and spends the rest of 385 9 destroying Section 385.3 with 30-day limited 10 downloads of your entire playlist without 11 paying for the minimum statutory rate. This 12 also applies to digital sound recording and 13 there's no money for that either. They are 14 allowed to take it for 30 days, download 15 without the 70 percent you should get from 16 Apple. 17       And I realize that some people 18 consider streaming different from downloads, 19 but to me, it is still performance. It is 20 still a -- there's still a mechanical side to 21 the -- to a stream, but it's a copyright. It's 22 a sound recording copyright basic before you 23 ever get to interactive, noninteractive, all 24 those different definitions, which I don't 25 think really matter anymore and I think as</p>	96	<p>1 partly my case, too. I believe the streamings 2 cannibalize phonorecords, streamings and 3 downloads. Streaming is the future, and if it 4 is the future, we must make sure we get paid at 5 this point. 6       As his own office said in the 7 current copyright music marketplace setting 8 conducted by the copyright office who issued 9 February of 2015, there is no policy 10 justification for a standard that requires 11 music creators to subsidize those who seek to 12 profit from their works, and that is absolutely 13 true, and that recent statement clearly 14 summarizes GEO's case in this hearing. 15       The copyright interests and needs of 16 millions of American recording artists and 17 independent label, songwriters being published, 18 performers come first before the wants and 19 demands of starts up like Pandora, Google and 20 Spotify, who seek to profit from other people's 21 creation and private property. 22       Additionally, Pandora's so-called 23 business model is not a matter of public 24 policy. As legendary singer-songwriter Rosanne 25 Cash said, streaming is just dressed up piracy,</p>
95	<p>1 SoundExchange said interactive and 2 noninteractive are boring in their conversions. 3 I think downloads and streaming are conversions 4 as well. 5       So another prime loophole is the 6 safe harbor in DCMA. It potentially lets 7 streamers bootleg your digital sound recorder 8 and I think that is wrong. 9       Section 114(f)(2)(B), I think (i), 10 the Copyright Act states: "In determining such 11 rates and terms, the judges must base their 12 decisions on economic, competitive and 13 programming information presented by the 14 parties. Specifically, they must consider 15 whether the service may substitute for or may 16 promote the sales of phonorecords or otherwise 17 affect the copyright owner's other streams of 18 revenue," and nothing could be more true than 19 that to streamers. 20       Now I was asked to prove in the 21 first response and I -- in my admitted written 22 statement, you know, do -- does streaming 23 cannibalize the sale of phonorecords, and I 24 think Mr. Pomerantz did a wonderful job proving 25 that, and I think they will prove that and it's</p>	97	<p>1 and she could not be more correct. She also 2 strongly argues there is no law form, moral 3 justification for music creators to subsidize 4 those who seek to profit from our work. 5       Back in 1971, RIAA president Stanley 6 Gortikov was called to testify in front of the 7 policy judiciary committee. His great quote 8 was: "The pirates skim the cream of what 9 artists and record companies offer, except for 10 one particular ingredient which he avoids like 11 the plague, our risks." 12       That is the exact predicament all 13 independent and individual digital sound 14 recording copywriter, creators are in with all 15 streaming, internet radio, Webcasting, and 16 video streaming corporations. 17       Recent register of copyrights from 18 Maria Pallante also notes that music creators 19 are forced to do business in legal quicksand, 20 and she is exactly right. Another classic 21 statement that summarizes GEO's case is that if 22 music did not pay, it would be given up, 23 whether it pays or not, the purpose of 24 employment is profit, and that is enough. And 25 that was written by a Supreme Court Justice</p>

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98	<p>1 Oliver Wendell Holmes in Herbert versus 2 Stanley. 3 GEO would also like to stress 4 Justice Holmes like Register Pallante, they 5 strictly used the word profit, not income, 6 payment or make money. He also used the word 7 music. Not a mechanical, a performance, or a 8 noninteractive stream are exempt from copyright 9 law. 10 Here is a Supreme Court opinion from 11 one of the most legendary respected justices, 12 emphatically stating that the entire purpose of 13 licensing music copyrights is to profit. That 14 means we profit. The individual copyright 15 owners, not Pandora, Pandora executives who 16 have taken out almost a half billion dollars 17 for themselves the past four years, which I 18 find incredible. 19 Justice Holmes also rightly points 20 if music did not pay, it would be given up. 21 That is where we are, Your Honor. I hope that 22 carries weight in this proceeding. 23 Since the digital revolution 15 24 years ago, I am seeing, as a songwriter and 25 someone who creates sound recordings together,</p>	100	<p>1 So what I am proposing, of course, 2 we are not dealing with songwriters and music 3 publishers in this hearing, but let's pay 4 recording artists and independent record 5 labels, and this includes the major labels, 25 6 cents up front, a one time fee in a streaming 7 account, it was bundled like the copyright 8 office wants to, and I think it's a great idea. 9 Let's start doing that and change the terms so 10 that we are not all put out of business. 11 And that is my basic case right 12 there. Is to have a copyright bundle streaming 13 account up front one time. If it is not 25 14 cents, it's 10 cents. I am trying to offer at 15 least a dollar. But when you look at -- 16 actually Mr. Nichols switch to G2 and then G3. 17 Recently, the RIAA came out with 18 these figures of what sound recordings have 19 been over through the course of history. Now, 20 to me, these are actual real benchmarks for 21 sound reporting copyrights. Now Pandora and 22 others will argue that, oh, no, that doesn't 23 apply but it is a copyright. It's a 24 performance. So this is what we should be 25 charging for streaming account for different</p>
99	<p>1 they are all bundled up for me. They are not 2 separate, but I am watching my friends go back 3 to Texas, work selling magazines, driving 4 around, working at Walmart, and if you listen 5 to Bart Herbison who says 90 percent is from 6 NSAI, 90 percent of songwriters and music 7 publishers in Nashville have been -- have gone 8 away the past 15 years. 9 And that goes for artists and sound 10 recording industry and independent labels too 11 and why we are here today. 12 So let me see. If you could please 13 put up my one exhibit here. What I am 14 proposing, the copyright office also -- I 15 participated in the last year's roundtables and 16 music licensing institute with the copyright 17 office, and they talked about bundling 18 copyrights. Now there is a carveout for RA and 19 SoundExchange, which I think should be included 20 in the bundled copyright, but what I am trying 21 to propose to Your Honor is, we are here to set 22 the rates and the terms, so let's change the 23 terms because there is no way that we can 24 survive without paying for the cost of 25 copyright creation.</p>	101	<p>1 things. 2 Let's switch to the other one, Mr. 3 Nichols. That is just a general one, but, you 4 know, I look back and I have the Beatles 5 proposal which is Proposal 3 which is basically 6 \$5 a song, and when you look back at the 7 Beatles album in 1964, it is \$5 a song. An 8 album should be about \$40. But we are at .00 9 nothing now. 10 So what I am trying to say is that 11 we should apply these sound recording 12 benchmarks that are real benchmarks to 13 streaming in a streaming account and that the 14 customer pays up front one time and pays for 15 the cost of copyright creation, which they are 16 not paying for right now and it is kind of a 17 scam. 18 So that is my case, and I would also 19 like to say something about benchmarks, and Mr. 20 Harrison is trying to say they offer open 21 market, fair market, effectively a competitive 22 market in their latest filing, they say true 23 competitive forces at arm's length, and to me, 24 these are not benchmarks because you are not in 25 a free market. The music business hasn't seen</p>

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102	<p>1 a free market grow over a hundred years and 2 this is statutory license, compulsory license, 3 statutory rate, consent decree, even this rate 4 court here. We are setting rates and we're not 5 letting millions of price points operate in a 6 free market to where that sets the benchmark 7 and I believe it would be much higher, and if 8 we're going to set a free market rate, then 9 let's set an actual free market rate. 10 And if we did set one, then we 11 wouldn't even be here, because the market will 12 take care of it for us. But while we're here, 13 if we are to going price fix, let's give us 14 something that we can create and have a 15 livelihood instead of just being robbed and 16 having costs, \$55 to register your work and 17 take over million streams just to pay for my 18 registration and my copyrighting work. 19 So in closing, I think that we 20 should -- Mr. Nichols go back to the other one. 21 The customer who pays for copyright creation 22 and it has to be part of a distribution model 23 and the dollar up front, maybe even more, one 24 time per song, then stream all you want if 25 streamers were still making profits and sell it</p>	104	<p>1 like an electric meter, which I said in my 2 amended written statement, and that the 3 customer gradually pays for these songs and, 4 you know, at least, it would, you know, if it's 5 a stream as a mechanical and a performance at 6 the same time, ten cents would cover the cost 7 of a mechanical, which I think is still there, 8 even though we are in a DSR hearing. 9 So I hope you will consider this, 10 Proposals 2 and 3 for up front copyright 11 streaming account. Thank you, Your Honor. I 12 appreciate it. 13 CHIEF JUDGE BARNETT: Thank you, 14 Mr. Johnson. 15 Mr. Rich, do you want to begin? 16 MR. RICH: Thank you. Thank you and 17 good morning, Your Honor. The order of 18 presentation on the service side, at least 19 insofar as the public rounds of openings is 20 concerned, will begin with my remarks on behalf 21 of Pandora. I expect to take about an hour. I 22 will be followed by Mr. Joseph on behalf of the 23 NAB. He will be followed by Mr. Hansen, 24 respecting iHeartMedia. Following that, Ms. 25 Ablin will make opening remarks on behalf of</p>
103	<p>1 advertising. 2 I think the bundle copyright idea is 3 the way to go and include SoundExchange, and 4 the other thing is my fifth amendment property 5 right, which I believe is absolutely being 6 violated. My right to property without due 7 process, without just compensation and 8 certainly these songs seem like they are for 9 public use. 10 And I also have a first amendment 11 right for my copyright, and that is it. So I 12 ask the Judge to please consider the copyright 13 bundling, and if not, Proposal 1 that I have 14 offers ten cents per stream, which is 15 reasonable. And I think -- what I am trying to 16 do with this is pass the cost of copyright 17 creation and not give it to Pandora, not say, 18 you need to have your advertisers get the money 19 or even the investors need to get more money. 20 Let's pass it on to the customers. Sure, it 21 will change your business model, but to me, I 22 think you guys had a legal business model the 23 whole time. 24 So if we're going to do ten cents 25 and not up front, I would like to see it maybe</p>	105	<p>1 the National Religious Broadcasters Music 2 License Committee. And Mr. Malone will then 3 speak on behalf of IBS and Harvard Radio. For 4 myself, my intention is to only pop up once 5 today. 6 CHIEF JUDGE BARNETT: Is Sirius 7 going to have a -- 8 MR. RICH: I beg your pardon. I 9 left Mr. Fakler out. Unintentional, 10 unintended. He will follow iHeartRadio's 11 presentation. Thank you very much. I 12 appreciate Ms. Ablin's presentation. 13 I intend only to be here once and 14 with that in mind, have created a binder of 15 materials which, with Your Honor's permission, 16 I would like to hand out, which I'm not going 17 to project, because the majority of it contains 18 protective order type material, and so I will 19 allude to them, but ask you to read them 20 privately when we get to the appropriate place. 21 CHIEF JUDGE BARNETT: Thank you. 22 MR. RICH: I have divided my opening 23 statement into three parts. First, I want to 24 talk a little bit about Pandora, its business, 25 what is unique as a music licensing platform,</p>

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106	<p>1 the nature of the competition it faces, and of</p> <p>2 course, the importance of the royalties to be</p> <p>3 set here to Pandora's ongoing business.</p> <p>4 You will hear more detail on each of</p> <p>5 these topics principally from Mr. Westergren,</p> <p>6 who is the founder of Pandora, Mr.</p> <p>7 Fleming-Wood, who is its chief marketing</p> <p>8 officer and from Michael Herring who is its</p> <p>9 chief financial officer.</p> <p>10 Second part of my remarks will</p> <p>11 describe the starkly different approaches to</p> <p>12 rate making, which have been adopted by the</p> <p>13 respective sides in construing the standard</p> <p>14 that governs this proceeding and applying it to</p> <p>15 proposed benchmark agreements. In connection</p> <p>16 with that portion of my opening, I'll discuss</p> <p>17 how Professor Shapiro, our lead economist and</p> <p>18 other witnesses will describe how Pandora's</p> <p>19 rate proposal fits closely the aspirational</p> <p>20 goal of determining rates that willing buyers</p> <p>21 will pay willing sellers a competitive margin,</p> <p>22 to license digital transmissions of sound</p> <p>23 recordings meeting the statute's requirements.</p> <p>24 I will discuss how in contrast, our evidence</p> <p>25 will demonstrate that the SoundExchange's rate</p>	108	<p>1 tiered genre stations, ranging from top 40 to</p> <p>2 highly specialized Bluegrass, Big Band,</p> <p>3 Bollywood and so forth.</p> <p>4 But the real heart of Pandora is</p> <p>5 personalized radio. On their computer or</p> <p>6 mobile phone, the user simply enters the name</p> <p>7 of an artist or genre, and then that is it.</p> <p>8 Pandora then creates a station based on that</p> <p>9 starting point, they call it a seed, with songs</p> <p>10 that share similar musicalological</p> <p>11 characteristics to the seed. What is the</p> <p>12 sauce. How does it get done.</p> <p>13 What makes Pandora different and</p> <p>14 more popular than other all Internet radio</p> <p>15 services combined is something they call the</p> <p>16 Music Genome Project. The team of Pandora</p> <p>17 music analysts, many with Ph.D.s in musicology,</p> <p>18 have spent the better part of 15 years mapping</p> <p>19 the detailed traits of over a million sound</p> <p>20 recordings. Those characteristics include</p> <p>21 tempo, instrumentation, melody, harmonic</p> <p>22 structure, lyrical content and vocal quality.</p> <p>23 Hundreds of traits in all that make up the</p> <p>24 musicalological DNA, as it were, of a given</p> <p>25 recording.</p>
107	<p>1 proposal fails in fundamental respects to do</p> <p>2 so.</p> <p>3 In the third component of my</p> <p>4 opening, I will discuss the principal ways we</p> <p>5 anticipate from the evidentiary filings to</p> <p>6 date, that SoundExchange will attempt to</p> <p>7 denigrate the services benchmarking drawn from</p> <p>8 the service's direct license very</p> <p>9 intentionally, as well as SoundExchange's</p> <p>10 efforts to prop up the probative value of the</p> <p>11 record companies own interactive services</p> <p>12 benchmark.</p> <p>13 So Pandora. Pandora is the</p> <p>14 country's most popular Internet radio service</p> <p>15 serving now over 80 million active users. It</p> <p>16 was launched in 2005 under the direction of its</p> <p>17 founder, Ken Westergren, and has grown steadily</p> <p>18 ever since. In many cities across the country,</p> <p>19 it's the most listened to radio service,</p> <p>20 period, including traditional terrestrial</p> <p>21 radio. Pandora has a very simple and intuitive</p> <p>22 interface. That interface as Mr. Pomerantz</p> <p>23 conceded, is largely unchanged from the way it</p> <p>24 operated when it was first launched. Like</p> <p>25 other radio services, Pandora offers expertly</p>	109	<p>1 Based on these traits or what are</p> <p>2 called genes, Pandora creates playlists with</p> <p>3 songs that share the same musical DNA as the</p> <p>4 seed and that spans sounds from indies and</p> <p>5 majors, songs that have had very little</p> <p>6 currency or popularity including songs that the</p> <p>7 listener has probably and most certainly have</p> <p>8 never heard before.</p> <p>9 Now Pandora then allows users also</p> <p>10 to give feedback preferences, by so-called</p> <p>11 thumbs up and thumbs down icons while the song</p> <p>12 is playing. Then the algorithms that underlie</p> <p>13 this big engine can then use that feedback</p> <p>14 along with the thumbs up and thumbs down of</p> <p>15 other users who have indicated similar musical</p> <p>16 tastes to further refine the listening</p> <p>17 experience.</p> <p>18 The result of this process is summed</p> <p>19 up by Mr. Westergren who has written direct</p> <p>20 testimony in Paragraph 3, quote, Pandora is a</p> <p>21 personalized Internet radio platform that</p> <p>22 exposes listeners to music they will love and</p> <p>23 gives artists the opportunity to have their</p> <p>24 music discovered by fans who might not</p> <p>25 otherwise have learned about them.</p>

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110	<p>1 Now, to be sure, Pandora provides</p> <p>2 benefits to artists and labels well beyond</p> <p>3 royalty payments. Pandora plays songs from</p> <p>4 more than 120,000 different artists a month.</p> <p>5 As I indicated, many of these artists lesser</p> <p>6 known, and many of them don't have any</p> <p>7 realistic prospect of being played on radio</p> <p>8 stations, traditional radio stations or even</p> <p>9 other major Webcasters.</p> <p>10 Pandora, in addition, receives</p> <p>11 thousands of artist submissions a month, both</p> <p>12 artist and record labels I should say, asking</p> <p>13 to be played on Pandora to gain wider audience</p> <p>14 reach for their music. Artists routinely</p> <p>15 report to Pandora that their recordings are</p> <p>16 thanks to Pandora, receiving exposure they</p> <p>17 would never have attained otherwise, and</p> <p>18 correspondingly, generating sales they never</p> <p>19 otherwise would have realized.</p> <p>20 Now the evidence that plays on</p> <p>21 Pandora's need to increase sales are not just</p> <p>22 anecdotal. You will hear from Dr. McBride, who</p> <p>23 is an inside the company scientist, about a</p> <p>24 project conducted with other scientific team</p> <p>25 colleagues. What they did was run a series of</p>	112	<p>1 managers data at a level that has never been</p> <p>2 before assembled, and it's highly useful,</p> <p>3 through something they call an artist marketing</p> <p>4 program.</p> <p>5 Pandora is making the uniquely rich</p> <p>6 trove of such data available to these artists</p> <p>7 and managers. This includes songs of the</p> <p>8 artist that are playing on Pandora, how often</p> <p>9 each play, how many listeners hear those songs</p> <p>10 and aggregated demographic information about</p> <p>11 those listeners, such as age, gender and</p> <p>12 geography.</p> <p>13 This has been proved to be highly</p> <p>14 useful in connection with figuring out other</p> <p>15 ancillary activities including where to</p> <p>16 schedule concerts and where the opportunity to</p> <p>17 boost sales is most available to these</p> <p>18 particular artists.</p> <p>19 Now although sometimes referred to</p> <p>20 as a customized or personalized service,</p> <p>21 Pandora is above all radio. Other than</p> <p>22 selecting this seed we discussed and thumbing</p> <p>23 up and thumbing down, the user just leans back</p> <p>24 and let's Pandora do the work of selecting a</p> <p>25 great playlist. This makes Pandora</p>
111	<p>1 experiments designed to empirically and</p> <p>2 rigorously test Pandora's impact, if any, on</p> <p>3 sales or sales recordings. So what they did</p> <p>4 was, they turned off thousands of songs. They</p> <p>5 basically stopped playing them in half the</p> <p>6 country. Half the country kept hearing the</p> <p>7 songs, the other half, they shut them down.</p> <p>8 And then they compared and tracked sales</p> <p>9 experience in those demographic markets with</p> <p>10 the turned-off songs versus the non-turned-off</p> <p>11 songs.</p> <p>12 And as Dr. McBride's testimony will</p> <p>13 explain and validate, the experiments</p> <p>14 definitively demonstrate that performances on</p> <p>15 Pandora actually caused sales of songs to</p> <p>16 increase. I want to emphasize that this is</p> <p>17 empirical evidence of a type never before</p> <p>18 presented in a CRB proceeding. It is not just</p> <p>19 anecdotal. It is not supposition. It's a</p> <p>20 rigorously conducted scientific experiment and</p> <p>21 Dr. McBride will appear and defend its</p> <p>22 integrity.</p> <p>23 Finally, by way of extra benefits to</p> <p>24 the recorded music industry, it's worth noting</p> <p>25 that Pandora also affords artists and their</p>	113	<p>1 meaningfully different than the so-called lean</p> <p>2 forward, on demand services like Rhapsody on</p> <p>3 Radio or Spotify, where the listener chooses</p> <p>4 the particular songs he wants to hear, the</p> <p>5 order in which he wants to hear them and can</p> <p>6 listen to them when and as often as he likes.</p> <p>7 Well, Mr. Pomerantz suggested that</p> <p>8 this is a slight difference in access to music,</p> <p>9 all evidence is really to the contrary, that it</p> <p>10 is actually a quite profound difference, not</p> <p>11 only in listening experience but in the nature</p> <p>12 of both the downstream, as we will talk about,</p> <p>13 and upstream markets or consumer user</p> <p>14 respectively on interactive services and</p> <p>15 noninteractive services.</p> <p>16 The point is that if a subscriber to</p> <p>17 an interactive service wants to gorge on a</p> <p>18 given song, album or artist, to rewind, skip</p> <p>19 without limitation, all of that can be done,</p> <p>20 all of that can be done unlike the limitations</p> <p>21 presented by Pandora being subject to the</p> <p>22 statutory license limitations.</p> <p>23 Now despite SoundExchange's efforts</p> <p>24 which you will hear much about, using the</p> <p>25 witness testimony, it's a poor trade, Pandora</p>

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114	<p>1 has an intense head-to-head competition with 2 interactive services or as being in the vortex 3 of this so-called convergence between 4 interactive and noninteractive services, none 5 of that can explain away this basic 6 distinction. Very basic distinction between on 7 demand listening where the user selects the 8 songs he or she will listen to, an Internet 9 radio where the service itself programs the 10 songs. 11 We will submit that the weight of 12 the evidence shows there is no slight 13 difference either in actual performance and 14 more importantly in its implications for rate 15 setting here. Indeed, if one looked at the -- 16 and thought about the very legislation giving 17 rise to these statutory proceedings, Your 18 Honor, as yourself as recently as 2013 19 recognized how fundamental this very 20 distinction in listening concept and in 21 accessibility to music, it's in your Web III 22 remand determination, may I remind you, you 23 indicated that the rationale for permitting the 24 on demand side of the market to be unregulated 25 be subject to the free market forces as it</p>	116	<p>1 all from the evidence that we had in the record 2 from the 2013? 3 MR. RICH: Fair question and 4 answering, we definitely will -- both our fact 5 and economic witnesses will do exactly that, as 6 will the survey results presented by Edison 7 Research, Mr. Rosin which is a current snapshot 8 of user behavior, interchangeability, so the 9 response -- not response, but a counter to the 10 Butler evidence, and that in combination will 11 directly address why, as I have indicated, 12 nothing has changed in the respect that were 13 relevant to your last determination. 14 JUDGE STRICKLER: Which specific 15 witness would you say was contrary to Ms. 16 Butler? 17 MR. RICH: Mr. Rosin of Edison. 18 Now, the core premise of 19 SoundExchange's case is that listening to 20 Pandora is a substitute for subscribing on 21 demand services such as Spotify, for a 22 proposition. And that Pandora in fact is not, 23 quote, much like radio, but instead satiates 24 the user's interest in deciding which sound 25 recordings he will receive to the same or</p>
115	<p>1 were, was Congress's recognition that 2 interactive services are the most likely to 3 pose the greatest risk of substitution. 4 That is, of course, displacement of 5 record sales. The reason being that the user 6 of an interactive service, in Your Honor's 7 words, quote, essentially decides which sound 8 recordings he will receive, unquote, open 9 quote, and analogous to the decision to 10 purchase music digitally or otherwise. 11 Conversely, Your Honor has 12 recognized Webcasters pose a, quote, major 13 difference, unquote, in the risk of 14 displacement and that's so because Webcasting 15 services, in your words, quote, play a more 16 passive role in the music selection process 17 with the Webcaster itself anticipating what 18 music the listener might enjoy, in your words, 19 quote, much like radio, unquote. 20 Nothing since 2013 has changed with 21 respect to those basic observations. 22 JUDGE STRICKLER: Web III remand 23 decision asks for those evidence -- preceded in 24 2013, will you please present a witness who 25 discusses how the convergence has changed if at</p>	117	<p>1 similar degree. 2 I respectfully submit that the 3 evidence we will submit will expose this as a 4 fundamental misconception. Nearly 70 percent 5 of the time spent listening to music is through 6 so-called lean back services, terrestrial radio 7 and Webcasting. 8 If you look at your first slide in 9 the demonstrative package, you will see that 10 through the shaded sectors, and you will see 11 another interesting statistic there. This is 12 an exhibit presented by Professor Shapiro at 13 Page 9 of his rebuttal testimony. I just put 14 it forward here. 15 You will see on that same chart that 16 only seven percent, only seven percent of total 17 music listeners is to interactive services. So 18 what does that tell us? Tells us that that 19 marketplace is populated by a small, but avid, 20 group of music listeners. The very survey I 21 just mentioned, Your Honor, conducted by Edison 22 Research, which was referenced in one or more 23 slides put up during his opening by Mr. 24 Pomerantz which has been retained by the music 25 industry on all sides for generations as the</p>

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118	<p>1 gold standard of survey research in this field,  2 conducted a survey here about which Mr. Rosin,  3 who is its president, will testify,  4 demonstrating among other fundamental  5 propositions, the following, which is as to the  6 small universe of avid music listeners, fewer  7 than four percent, four percent of the  8 respondents to the Edison Research's survey  9 reported paying for subscription to the by far  10 dominant platform premium on-demand service,  11 pardon me, Spotify.</p> <p>12 Fully 91 percent of respondents who  13 are not current subscribers to an on-demand  14 service indicated that they were not at all  15 likely or not very likely to spend \$9.95 a  16 month to subscribe to such a service, and a  17 highly significant majority responded to the  18 same effect even when punitive price points  19 were dropped down to as low as 3 or \$4 a month.  20 For its part, that survey will indicate and the  21 testimony will reveal that Pandora with its  22 more than 80 million active users is  23 predominantly shifting listeners from  24 terrestrial radio, which pays nothing to the  25 record labels, or second largest category of</p>	120
119	<p>1 Over the first decade of its existence, its  2 revenues have grown from something less than \$3  3 million a year to over \$900 million in 2014,  4 but the astonishing revenue growth really tells  5 only half the story. Pandora has plowed back  6 into the business and incurred costs of nearly  7 \$2.7 billion to grow to scale and to ultimately  8 hope to attain its first profitable year.  9 Over one billion dollars of that  10 \$2.7 billion has been paid in the form of  11 royalties to recording artists and record  12 labels. And in 2014 alone, Pandora will have  13 paid more than \$400 million in statutory  14 royalties.</p> <p>15 To place those in some perspective,  16 I just offer you two slices of information.  17 \$400 million represents more than half of  18 SoundExchange's total receipts across all  19 categories of digital service. Not simply  20 limited to Webcasting. More than half of  21 SoundExchange's total receipts, statutory  22 users, licensees, are paid by Pandora itself.  23 That 2014 sum exceeds the total music  24 performing rights royalties paid by the entire  25 terrestrial Webcasting industry ASCAP, BMI and</p>	121
118	<p>1 diversion for listeners is people who were not  2 listening to music at all. So if you step back  3 and think about that, the significant majority  4 of listeners who are attracted to Pandora  5 historically either never through terrestrial  6 radio paid the record industry anything at all  7 with respect to sound recordings or are new  8 music listeners and therefore every play of  9 these converted listeners, whether from  10 terrestrial radio time or from other  11 entertainment options is money in the record  12 industry's pocket. Key statistic, key  13 statistic.</p> <p>14 Again, from the Edison survey, only  15 one percent of Pandora's monthly users said  16 that the time spent listening to Pandora is  17 replacing time spent listening to an on-demand  18 service like Rhapsody or Spotify. One percent.  19 This is not evidence of substitution  20 or of convergence between services like Pandora  21 and on demand services. I will come back to  22 that a little bit later.</p> <p>23 Pandora, which has been growing its  24 revenue just as fast as it can, has experienced  25 pretty astonishing growth since its inception.</p>	120
119	<p>1 SESAC for the very musical works embodied in  2 these sound recordings. Let me say that again.  3 The \$400 million paid by one entity, Pandora,  4 outstrips the cumulative payments by all  5 terrestrial radio broadcasters to use all of  6 the musical works embodied in all of these  7 sound recordings. This is a remarkable sum of  8 money by any measure.</p> <p>9 Now as is known to the judges,  10 Pandora has been paying royalties to the record  11 industry based on the so-called peer-play  12 rates. Those negotiated rates, it's important  13 to point out, are different and lower than the  14 statutory rates which Mr. Pomerantz put up on  15 the screen that were established by the CRB in  16 Webs II and III.</p> <p>17 An important point is that when Mr.  18 Pomerantz says that the rate Pandora seeks  19 here, which I think the number was 52 percent  20 lower than statutory rate, that loads the deck  21 a bit, because Pandora has never paid the Web  22 II or III statutory rate. It has paid  23 significantly less. And its rate proposal is  24 far more in line with the rates it has paid for  25 reasons independently justifiable.</p>	121

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122	<p>1 You don't rely on the peer-play</p> <p>2 rates to set a fee here like Tweeter, but in</p> <p>3 point of fact, Pandora is not looking to reduce</p> <p>4 its royalty obligations by a level of anything</p> <p>5 like 52 percent from any asserted prior fee</p> <p>6 obligation. It never paid under the Web II or</p> <p>7 Web III rates. In fact, had it paid under</p> <p>8 those rates, it would have incurred beyond the</p> <p>9 billion dollars it has paid another \$800</p> <p>10 million in royalty obligations over the span of</p> <p>11 Web II and Web III and it would have translated</p> <p>12 into fees exceeding 80 percent of Pandora's</p> <p>13 revenues over that entire time.</p> <p>14 As Mr. Herring will testify, to</p> <p>15 avert going out of business under a scenario</p> <p>16 where Pandora would have paid out those higher</p> <p>17 rates, Pandora would have had to pull back on</p> <p>18 necessary investments to grow the business and</p> <p>19 to continue to develop the Internet radio</p> <p>20 advertising market, and in his professional</p> <p>21 estimation, the result of such cutbacks would</p> <p>22 have been at best a business vastly reduced in</p> <p>23 scale and accompanying that vast reduction in</p> <p>24 scale, a company that would have actually paid</p> <p>25 significantly reduced royalties to artists and</p>	124	<p>1 it's not a scientific process because it</p> <p>2 requires making a number assumption, but I</p> <p>3 think he will certainly be the best person and</p> <p>4 I think he will make his best run at it.</p> <p>5 JUDGE STRICKLER: Okay.</p> <p>6 MR. RICH: Now, it is not an option,</p> <p>7 not an option for Pandora to simply pass along</p> <p>8 higher royalties by raising subscription</p> <p>9 prices. As Your Honors are aware, a very small</p> <p>10 percentage of Pandora's business is</p> <p>11 subscription-based. It's advertising, too.</p> <p>12 Contrary to what you're going to</p> <p>13 hear Dr. Blackburn from the other side</p> <p>14 speculate, it is not an option for Pandora</p> <p>15 simply to, quote, sell more ads. And again,</p> <p>16 Mr. Herring, the CFO is going to explain, this</p> <p>17 quarterback, this armchair quarterbacking as I</p> <p>18 will call it, he doesn't describe it. I'll</p> <p>19 call it that, ignores the fundamental realities</p> <p>20 of a growing business like Pandora. What Dr.</p> <p>21 Blackburn fails to account for is that</p> <p>22 decisions that might increase short-term</p> <p>23 profitability can have severely adverse</p> <p>24 consequences over the longer term.</p> <p>25 Pandora is constantly running models</p>
123	<p>1 labels, given the fact that it would not have</p> <p>2 been able to continue to allow unlimited growth</p> <p>3 in numbers of compensatory pricing.</p> <p>4 Now going forward under Pandora's</p> <p>5 rate proposal, it is estimated that artists and</p> <p>6 labels will receive more than \$2 billion in</p> <p>7 royalty payments over the 2016 to 2020 license</p> <p>8 term. Conversely, if the rates were set by</p> <p>9 Your Honors in a range of SoundExchange's</p> <p>10 proposal, again it is Pandora's professional</p> <p>11 judgment and you will hear it, and seeing those</p> <p>12 defendant's reasoning on cross-examination I'm</p> <p>13 sure, that they would likely need to engage in,</p> <p>14 again, serious cost curtailment measures such</p> <p>15 as capping listening, which they had to do</p> <p>16 twice before, as recently as 2013, with respect</p> <p>17 to their mobile platform, with resulting</p> <p>18 SoundExchange payments actually coming in below</p> <p>19 what we estimate the \$2 billion payments that</p> <p>20 would be yielded by adoption of a rate proposal</p> <p>21 asked for in the range.</p> <p>22 JUDGE STRICKLER: Will one of your</p> <p>23 witnesses testify how much less?</p> <p>24 MR. RICH: I think Mike Herring</p> <p>25 would be the best person to ask. By nature,</p>	125	<p>1 and making evaluative decisions as to</p> <p>2 optimizing its advertising mix, so as to</p> <p>3 continue to grow its listener base and at the</p> <p>4 same time, achieve profitability for its</p> <p>5 shareholders. We will talk about that at</p> <p>6 length to a wealth of questions for us, Your</p> <p>7 Honors.</p> <p>8 These assessments -- I am told I</p> <p>9 better move along. These assessments are not</p> <p>10 offered to suggest that Pandora's entitled to</p> <p>11 any special treatment either to ensure its</p> <p>12 survival or prosperity. To the contrary, it is</p> <p>13 solely intended to be made that Pandora would</p> <p>14 not be a willing buyer at rate levels which</p> <p>15 would create potentially insurmountable hurdles</p> <p>16 in its path of growing into a profit.</p> <p>17 Let me get to heart of the matter.</p> <p>18 The parties' competing approaches to rate</p> <p>19 setting.</p> <p>20 As Your Honors are aware, I'm going</p> <p>21 to read a little bit just to move along, and I</p> <p>22 apologize, I normally wouldn't but I want to</p> <p>23 stay on track.</p> <p>24 As Your Honors are aware, the rates</p> <p>25 and terms determined in this proceeding are</p>



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126	<p>1 those that, quote, most clearly represent those 2 that would have been negotiated in the 3 marketplace between a willing buyer and a 4 willing seller. That is the statutory task. 5 It has never seriously been contested and it is 6 by now firmly established that this task calls 7 for rates and terms that would have emerged 8 from negotiations in a competitive marketplace. 9 It's also clear that competitive, as 10 Mr. Pomerantz also would agree, does not mean 11 perfectly competitive but effectively 12 competitive, and certain economists, including 13 ours, I think tend to prefer to it as workably, 14 but they are interchangeable for this purpose. 15 It is also clear, however, that 16 competitive does not mean monopolize. Pandora 17 will present a straightforward and we believe 18 compelling case supporting its proposed rate 19 and rate structure. The case features the 20 first meaningful evidence of the Webcast 21 proceeding of direct licenses entered into 22 between parties to this very proceeding 23 covering the very same statutory rates as are 24 involved here. 25 In other words, the agreements</p>	128	<p>1 alignment of Pandora's direct license benchmark 2 and the fact that SoundExchange's benchmark 3 aligns in only one of the four categories. 4 There are other fundamental 5 differences between these competing benchmarks 6 however as well. There is for the first time, 7 a developed record as to the starkly different 8 competitive conditions in two distinct 9 so-called upstream markets for licensing sound 10 recording performing rates. One of those 11 markets is involving statutory Webcasters and 12 the other interactive services. 13 So just to talk about, to get 14 terminology straight at least as I tend to use 15 it, and as explicated by Professor Shapiro's 16 written rebuttal testimony at Pages 7 to 13: 17 In order to properly understand the competitive 18 dynamics of the recorded music market, one 19 needs to distinguish between the so-called 20 downstream market to provide music to listeners 21 which, if you will flip the page, it's depicted 22 graphically in Slide 3, that is showing all of 23 the different music inputs for listeners and 24 the separate upstream market, which you will 25 see at Slide 4. These are drawn again from</p>
127	<p>1 forming the nucleus of Pandora's rate proposal 2 have been entered into by the same buyers and 3 the same sellers valuing the same copyright 4 rights as are involved in this proceeding. 5 Unlike in previous Webcasting proceedings, 6 there is no need to reach into other markets 7 that require necessarily imprecise adjustments 8 to account at an minimum for different buyers 9 acquiring different rates under potentially 10 different market conditions. 11 In contrast, SoundExchange again 12 relies on benchmarks on rates major record 13 labels have obtained in license agreements with 14 on demand services like Spotify. At the 15 outset, as a comparative here, this benchmark 16 has two strikes against it. It involves some 17 of the same sellers as are involved in rate 18 setting here, it involves different buyers 19 whose services make fundamentally different 20 uses of sound recordings that implicate grants 21 of different and broader copyright rates. 22 If you look at Demo Slide 2, please, 23 we simply depicted the basic attributes that 24 one looks for in a benchmark comparison, and in 25 Column 1, you see four checks in terms of the</p>	129	<p>1 Professor Shapiro's testimony. A separate 2 upstream market for the inputs used to make the 3 final products that consumers use. In this 4 case, the relevant markets in which servicers 5 acquire the necessary licenses to perform 6 recorded music. 7 Professor Shapiro's comprehensive 8 examination of the competitive conditions in 9 the distinct upstream markets for licensing 10 interactive and noninteractive services 11 demonstrate the fundamental difference in the 12 ability of these servicers to control the mix 13 of music they performed. In only one of those 14 two upstream markets involving noninteractives, 15 Webcasters, does one find the characteristics 16 necessary to enable meaningful competition to 17 occur between and among record labels for plays 18 of their sound recordings. 19 I quote Mr. Pomerantz from his 20 opening, something I could not contest at all. 21 Good competitors try to take customers away 22 from each other. That is what they do, end 23 quote. To observe complete absence of record 24 companies competing with one another to take 25 plays from each other in the interactive space</p>

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130	<p>1 means virtually by definition, that one doesn't</p> <p>2 observe the necessary features of a competitive</p> <p>3 market in the licensing of sound recording</p> <p>4 performing rights to interactive services.</p> <p>5 That interactive services benchmark</p> <p>6 built on, we will submit and our evidence will</p> <p>7 prove, it fundamentally fails to meet the</p> <p>8 criterion that the rates to be set in this</p> <p>9 proceeding must reflect those that would be</p> <p>10 negotiated in a competitive market.</p> <p>11 And what's the basis for this key</p> <p>12 difference? Why is one market capable of this</p> <p>13 form of fundamental price competition and the</p> <p>14 other provably is not. The key is a concept</p> <p>15 called steering. Steering as our economists</p> <p>16 use the term is the ability of a service to</p> <p>17 play relatively more or relatively fewer sound</p> <p>18 recordings from a given label based on the</p> <p>19 prices charged. Fairly basic. Somebody says,</p> <p>20 I'm going to reduce my per-play rate by 10</p> <p>21 percent if you will play me more, then there is</p> <p>22 an incentive, all things equal, for that</p> <p>23 service to say that sounds good, assuming I can</p> <p>24 do it commercially viably and not harm my</p> <p>25 business and at the same time by definition,</p>	132
131	<p>1 competitors of that price cutting label who</p> <p>2 refuse to do so risk having less of their</p> <p>3 product sold, fewer performances of their music</p> <p>4 played, that is simply how competitive markets</p> <p>5 operate.</p> <p>6 The record demonstrates that Pandora</p> <p>7 has an unequivocal ability to steer at a robust</p> <p>8 level. It also shows the unequivocal lack of a</p> <p>9 similar ability by on demand services certainly</p> <p>10 at minimum with respect to the basic raise on</p> <p>11 debt of those services which is allowing their</p> <p>12 user to dictate what is getting played, their</p> <p>13 unequivocal inability to do the same level of</p> <p>14 steering.</p> <p>15 Now you will hear from both</p> <p>16 Professor Shapiro and from Pandora's senior</p> <p>17 scientist, Dr. McBride, about a really</p> <p>18 important Point 14 steering experiment in which</p> <p>19 the company engaged. What they did was to test</p> <p>20 the proposition of how sensitive listenership</p> <p>21 on Pandora would be to meaningful alterations</p> <p>22 of the intensity of use of various majors,</p> <p>23 repertoires. They tested it at a 15 percent</p> <p>24 level higher or lower for Universal or Warner,</p> <p>25 Sony and they tested it at a 30 percent level</p>	133

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134	<p>1 dubbed, including by the record industry, 2 quote, a virtual fifth major, unquote. 3 JUDGE STRICKER: Are you referring 4 to Merlin? 5 MR. RICH: Yes. And of course, that 6 was -- I should say that was at the time when 7 there weren't four actual majors, and now I 8 guess, to use the analogy, would be it is a 9 virtual fourth major, if I may take the liberty 10 to convert that. 11 By all accounts, including those of 12 SoundExchange's witnesses from whom you will 13 hear, Messrs. Wheeler and Van Armen, Merlin is 14 a sophisticated organization which is savvy in 15 the digital licensing arena and one that is 16 able to negotiate rates that are comparable to 17 those in the majors. One of the interesting 18 features of this case is that SoundExchange's 19 own principal economic expert, Professor 20 Rubinfeld, himself has studied and proffered 21 analyses as to what gap one would experience 22 and one has observed in the licensing of sound 23 recording performing rights in agreements 24 entered into by the majors on one hand and the 25 independent labels on the other.</p>	136
135	<p>1 So any suggestion that the Merlin 2 agreement is somehow tainted or 3 unrepresentative because it only involves 4 indies is responded to virtually completely by 5 Professor Rubinfeld of SoundExchange's own 6 analysis. He found barely a two percent price 7 differential in the marketplace. Two percent. 8 Between the royalty fees one would expect the 9 majors to elicit in marketplace transactions 10 for sound recording performing rights and what 11 independent labels would be expected to yield. 12 It is really a non-factor. It's a rounding 13 error. 14 Now Merlin saw the benefit of 15 entering into a direct license arrangement with 16 Pandora because of its very recognition of 17 Pandora's ability to steer. In the words of 18 one of its deposition witnesses, Mr. Lexton, 19 whom you will hear from, more air play is 20 better than less air play. That sort of sums 21 it all up. They recognized it and they went 22 for it. 23 The resulting agreement captures 24 precisely this competitive dynamics. Merlin 25 members receive more air time in exchange for</p>	137

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138	<p>1 The bottom line is that UMG and its 2 advisors explained to the FTC that interactive 3 services by their nature must offer consumers 4 access to virtually all music to be viable. We 5 understand that. That is a fact. That's true. 6 As a consequence, catalogs of each of these 7 majors are must-haves for an interactive 8 service making the catalogs of the majors 9 compliments rather than substitutes. 10 Those are again the sort of terms of 11 economics which will I think be explicated as 12 we go, but bottom line meaning that in a -- you 13 don't see in that marketplace efforts, you 14 don't see price rivalry between competitors to 15 achieve more plays than its competition. That 16 will be substitution. Rather, every major's 17 entire repertory is needed in unlimited amounts 18 by on demand services making them compliments. 19 Now, in plain English terms, as 20 opposed to economies, the stark admissions 21 attest to a complete lack of price competition 22 between and among recording music companies in 23 what is now an even more concentrated industry 24 in their dealings with interactive streaming 25 services. Not a lack of perfect competition or</p>	140	<p>1 market. Recent deposition when asked whether 2 that was simply an accidental omission, Dr. 3 Rubinfeld said no, he had been aware of it from 4 the beginning, and while he tries mightily in 5 his rebuttal of testimony to make up for lost 6 ground, finally, at Page 26 of his rebuttal 7 testimony, the word competition first appears, 8 the kind of attributes that he indicates 9 resuscitates the interactive service market 10 that, in fact, allegedly infuse it with 11 sufficient indicia of competition to provide 12 the benchmark simply is unavailing. 13 Can I get a time check from someone? 14 Let me just say, I am moving through 15 some material I would have preferred to cover, 16 but let me just say this, that while we believe 17 and our testimony will suggest, that this 18 crippling limitation of SoundExchange's case, 19 wholly aside from the fact that it requires 20 lots of other adjustments to make it comparable 21 to this market setting, should render it an 22 inactive benchmark for this proceeding. At a 23 bare minimum, it would have been incumbent on 24 SoundExchange and its experts to attempt to 25 make some adjustment beyond merely its</p>
139	<p>1 even of effective competition, no competition 2 at all. 3 Now while these admissions might 4 have helped secure the merger, for reasons I 5 won't go into, they are devastating. We will 6 submit in this record here, and hence, I might 7 add, it is no surprise the lengths to which 8 SoundExchange went to avoid producing these 9 privileged documents, but now we have them. 10 Now notably, in Mr. Rubinfeld's -- 11 Dr. Rubinfeld's written direct testimony in 12 this case, while he extensively discussed why 13 the major licenses with on demand services 14 purportedly render them optimal benchmarks 15 here, he failed to address at all, not a word, 16 the necessary showing that the rates emerging 17 from these licenses must reflect those that are 18 emerging in a competitive marketplace. He went 19 through lots and lots and lots of factors, 20 indicating willing buyer, willing seller and 21 the like, but never mentioned the word 22 competition once, and therefore, devotes not a 23 word to the critical evidentiary showing of 24 what the transactions could be said to have 25 occurred in an effectively priced competitive</p>	141	<p>1 interactivity adjustment to account for this 2 lack of basic competition in the benchmark 3 market, simply to ignore it, simply to hope it 4 won't see the light of day, simply to dance 5 around it by saying there are lots of other 6 externalities in the marketplace that limit the 7 ultimate pricing ability of a major is no 8 substitute for that test of competition, which 9 is head to head competition. 10 JUDGE STRICKLER: I apologize. Mr. 11 Rich, will any of your witnesses be testifying 12 as to the effect of the rates that Pandora 13 proposes on the capacity of record companies, 14 both majors and the independents to recover the 15 cost of creating the copyrights? 16 MR. RICH: I'm not aware that we 17 have taken on that issue, Your Honor. 18 Let me quickly turn to some of 19 SoundExchange's retorts to some of this because 20 nothing I am saying is new to the other side, 21 and we have had a chance to exchange rounds as 22 you know. 23 So how does SoundExchange attack the 24 Merlin agreement? Principal argument is the 25 supposed shadow of the statutory license</p>

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142	<p>1 argument.</p> <p>2 As we interpret Professor Rubinfeld,</p> <p>3 its sponsor, we would have the judges disregard</p> <p>4 any, any marketplace agreement reached by a</p> <p>5 noninteractive, I will say, other than Apple,</p> <p>6 which helps them but we believe will not. At a</p> <p>7 level below the statutory rate, so that you</p> <p>8 should disregard any private agreement reached</p> <p>9 by any service subject to a statutory license</p> <p>10 that is reached at a level below the statutory</p> <p>11 rate as necessarily tainted by this so-called</p> <p>12 shadow of the statutory license.</p> <p>13 As we understand Professor</p> <p>14 Rubinfeld's logic, every such agreement is</p> <p>15 suspect insofar, A, as the service always had a</p> <p>16 statutory license available to fall back on,</p> <p>17 and B, that the record label involved couldn't</p> <p>18 decline to issue a license, let alone at a</p> <p>19 price higher than the statutory license.</p> <p>20 Now, one can accept each of those</p> <p>21 propositions standing on their own. But the</p> <p>22 question left completely unanswered by</p> <p>23 Professor Rubinfeld is what would motivate a</p> <p>24 record label to license a statutory service at</p> <p>25 below the prevailing statutory rate, which is</p>	144	<p>1 Now to be sure, there is a quote up</p> <p>2 on one of Mr. Pomerantz's demonstratives, an</p> <p>3 alleged admission by our guy, Professor</p> <p>4 Shapiro, that statutory rates do have an impact</p> <p>5 on how one observed transactions involving</p> <p>6 statutory licenses, we agree with that and</p> <p>7 Professor Shapiro agrees with that. But it's</p> <p>8 not the affect, it's not the affect that</p> <p>9 Professor Rubinfeld postulates.</p> <p>10 Instead, as Professor Shapiro will</p> <p>11 explain, the impact of the statutory license</p> <p>12 when one observes a Merlin-type transaction is</p> <p>13 to artificially elevate the prices that were</p> <p>14 agreed to above fair market levels because in</p> <p>15 that situation, the statutory rate acts as a</p> <p>16 magnet pulling the negotiated rates up towards</p> <p>17 it, so if there is a distortion in the</p> <p>18 marketplace, in a situation where Professor</p> <p>19 Rubinfeld has conceded one would expect to find</p> <p>20 transactions bidding below the statutory rate,</p> <p>21 it would be if anything, that the observed</p> <p>22 transactions overstate the actual fair market</p> <p>23 price for the reasons that Professor Shapiro</p> <p>24 explained.</p> <p>25 What about the asserted</p>
143	<p>1 what we have observed in the Merlin and Naxos</p> <p>2 transactions.</p> <p>3 Well, the answer -- it's actually</p> <p>4 supplied unwittingly by Professor Rubinfeld</p> <p>5 himself, because when he filed his written</p> <p>6 direct testimony not yet aware of these direct</p> <p>7 license arrangements, he correctly observed</p> <p>8 that, quote, if the statutory rate is too high,</p> <p>9 unquote, i.e., if it exceeds the market rates</p> <p>10 that will be voluntarily negotiated between</p> <p>11 willing partners in the absence of a statutory</p> <p>12 license, then licensees and licensors would</p> <p>13 have a joint incentive to renegotiate. That is</p> <p>14 Professor Rubinfeld's own statement of basic</p> <p>15 economic principle.</p> <p>16 What he stated is precisely what the</p> <p>17 Pandora Merlin and Pandora Naxos transactions</p> <p>18 revealed. Sellers determining it to be in</p> <p>19 their economic interest, the license plays</p> <p>20 Pandora at rates below the statutory rate at</p> <p>21 which Pandora has been paying to have their</p> <p>22 music played more. Discounting below the</p> <p>23 statutory rates, in Professor Rubinfeld's own</p> <p>24 words, provides clear evidence that the</p> <p>25 statutory rate, quote, exceeds the market rate.</p>	145	<p>1 representativeness of the Merlin transaction,</p> <p>2 another refrain from the other side. A couple</p> <p>3 quick points.</p> <p>4 The fact that Merlin and Naxos deals</p> <p>5 reflect the direct license were solely a small</p> <p>6 percentage of record labels and don't</p> <p>7 themselves at least yet represent a large</p> <p>8 percentage overall of spins on Pandora, doesn't</p> <p>9 suggest they should get only limited weight.</p> <p>10 As I've already noted, Merlin is a</p> <p>11 heavyweight, a virtual fourth major and</p> <p>12 SoundExchange and its witnesses repeatedly site</p> <p>13 as being a significant competitive force in the</p> <p>14 industry. I've mentioned already that the</p> <p>15 argument that it can't be representative</p> <p>16 because no major signed it, is responded to by</p> <p>17 none other than Professor Rubinfeld himself,</p> <p>18 who in defending his own interactive services</p> <p>19 benchmark featuring only licenses by the major,</p> <p>20 it's the flip side, says don't worry about the</p> <p>21 non-including of indies because what the</p> <p>22 marketplace tells us is there is no real</p> <p>23 difference between them. Sauce for the goose,</p> <p>24 sauce for the gander.</p> <p>25 Same argument would apply to any</p>

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146	<p>1 attack on the Merlin agreement on the basis 2 that the majors would certainly have gotten 3 much higher fees when SoundExchange in the 4 comments says this is not how this market has 5 organized itself is operated. 6 I will skip present purposes, Dr. 7 McBride's impact on sales experiment which 8 provides further support for the validity and 9 representative nature of the Merlin agreement, 10 and I just want to indicate finally though, and 11 this is a fact of life, that the record is 12 replete and you will see evidence of record 13 company testimony, that even though 14 transactions below the statutory rate may make 15 economic sense, years of creating adverse, CRB 16 president, counseled many companies and to this 17 day, counseled many companies against entering 18 into such agreements. 19 One shouldn't underestimate the 20 limiting affect on direct license transactions 21 one would otherwise expect to see on the basis 22 of this broad based record industry. 23 How much more to an hour? 24 MR. LARSON: Five minutes. 25 MR. RICH: All right. Other</p>	148	<p>1 remarkable. 2 The argument appears to suggest that 3 Your Honors need not be concerned about the 4 competitiveness of the interactive services 5 market in assessing a proper benchmark here, 6 insofar as the same noncompetitive condition 7 afflict the Webcasting market. So rather than 8 frontally address and attempt economically to 9 adjust for the monopoly pricing conditions that 10 afflict the interactive services market, 11 Professor Rubinfeld would sooner have Your 12 Honors act upon -- what I'll call a perverse 13 principal, which is that you needn't worry 14 about the severe shortcomings of the 15 interactive services benchmark, insofar as in 16 the absence of a statutory license, there 17 wouldn't be any competition anyway among record 18 labels in licensing Webcasters. 19 The argument is not only remarkable, 20 I'll submit, it misses its mark. First of all, 21 there is no -- there is certainly an incomplete 22 record and a debated record as to the degree of 23 which any major is a, quote, must-have, in the 24 sense that for a Webcaster -- in the sense 25 that, for example, Pandora could do entirely</p>
147	<p>1 defenses of interactive services benchmark. 2 Two arguments. The suggestion that the market 3 is competitive. I think I have really covered 4 that and I'm not going to spend very much time 5 on it at all. It is belied by the evidence. 6 It is belied by the admissions you will see of 7 the record industry and of its own 8 representatives in another setting here. There 9 is just a complete lack of ability to steer on 10 the part of the on demand services that freezes 11 price competition in that market. 12 And again, Professor Rubinfeld's, 13 late in the day, rebuttal effort to demonstrate 14 that the market -- that benchmark market 15 evinces sufficient indicia of competition to 16 qualify as effective competition. We feel when 17 the record is complete, will be shown not to 18 hold water. 19 Strange argument, strange argument, 20 averted to by Mr. Pomerantz in his opening. 21 Mr. Rubinfeld speculates that while major 22 labels may be must-haves that were referred and 23 both used for interactive services, so too are 24 they must-haves for Webcasters. The 25 implications of this argumentation are pretty</p>	149	<p>1 without, let's say, Universal. There is 2 differences of opinion. Pandora has never 3 reached that point of determination, it hasn't 4 tested for that, we all know the answer. 5 But even assuming that were the 6 case, let's stipulate that the majors are 7 must-haves, that begs the relevant question. 8 The relevant issue here is whether Webcasters 9 can influence the extent to which they will 10 perform work from a catalog of a major. That 11 is the essence of steering. By the nature of 12 an on-demand service, an interactive service 13 lacks that ability, everyone, Professor 14 Rubinfeld included, recognizes that Webcasters 15 like Pandora do have that ability. 16 I will stop here. I wanted to cover 17 convergence, but out of respect for my 18 colleagues and the Apple agreement which I 19 suspect a number of others will cover, I will 20 pause here and defer to my colleague, and you 21 will hear more on those topics certainly during 22 the proceedings on this case. Thank you very 23 much. 24 CHIEF JUDGE BARNETT: Thank you. We 25 will take our noonish recess at this time. We</p>

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150	<p>1 will reconvene at 1:40 and I ask during this 2 recess, that you not monopolize the clerk's 3 time. This is her lunchtime as well. If you 4 need to confer with her, we will do that at the 5 end of the day. 6 (A short recess was taken.) 7 CHIEF JUDGE BARNETT: Good 8 afternoon. Please be seated. 9 Before we started we asked 10 facilities to lower the temperature in this 11 room as much as possible. I think there's a 12 congressional edict that says, you know, 13 temperature can only be between this point and 14 that point. Consequently, with all these hot 15 bodies in the room, we're all very, very warm, 16 as I'm sure you are too. 17 Please, please feel free to remove 18 your jackets. It is really -- we try to 19 maintain a bit of formality, but I don't want 20 to see anybody like dropping out during the 21 middle of the proceeding. So please feel free 22 to remove your jackets and make yourselves as 23 comfortable as possible. 24 We did call at noon to ask them to 25 lower the temperature again. So we'll see if</p>	152	<p>1 just have to take whatever it is that I say, I 2 guess. 3 CHIEF JUDGE BARNETT: At your peril. 4 MR. JOSEPH: I understand, and I'm 5 willing to assume the risk. 6 This afternoon I am going give you a 7 preview of the evidence that NAB expects to 8 present in this case to show why that evidence 9 will support a rate for simulcasting of no more 10 than .05 cents per performance with no 11 percentage of revenue component. 12 First I will discuss what 13 simulcasting is and why even SoundExchange's 14 witnesses admit that simulcasting is 15 significantly different from the other services 16 that are participating in this proceeding. 17 I will introduce you to NAB's 18 broadcaster witnesses and summarize the 19 highlights of what they will tell you about 20 their businesses. 21 Second, I will dive into the 22 economics, introducing Professor Michael Katz, 23 NAB's lead economic expert and will describe 24 his testimony in which he elaborates on the 25 economic significance of competition and</p>
151	<p>1 it happens. 2 Mr. Joseph, are you next up? 3 MR. JOSEPH: I am, Your Honor. 4 Thank you. 5 CHIEF JUDGE BARNETT: Oh, and before 6 you get started, Mr. Joseph. 7 From facilities again. There is a 8 door that is directly at the back of the room. 9 That is an exit. And no chairs can block that 10 door. There's a door over there that says "Not 11 an Exit." It's okay to sit in front of that 12 one, just not in front of the one that's 13 directly in the center at the back. Thank you. 14 MR. JOSEPH: Thank you, Your Honors. 15 And good afternoon. 16 My name is Bruce Joseph. I am here 17 today representing the National Association of 18 Broadcasters, which is appearing in this case 19 on behalf of its members who are simulcasting 20 their radio stations over the Internet and 21 those who would consider simulcasting their 22 radio stations over the Internet if the 23 economics permitted it. 24 Today it's just me. I don't have 25 any handouts. No dogs. No ponies. You'll</p>	153	<p>1 explains why sound recordings' primary 2 benchmark in this case does not reflect 3 competitive rates. 4 Professor Katz will also testify 5 that even correcting for just some of the flaws 6 in SoundExchange's benchmark analysis would 7 result in rates at a level of those proposed by 8 NAB. 9 Third, I will discuss the evidence 10 that will show that SoundExchange's proposal 11 for a greater-of fee is neither economically 12 supportable nor administratively viable for 13 simulcasting. 14 Finally, I will discuss the evidence 15 demonstrating why SoundExchange's late-found 16 Apple benchmark should be rejected and why 17 neither the existing Web III rates nor the 18 NAB/SoundExchange Webcaster Settlement Act 19 agreement are valid indicia of effectively 20 competitive license fees. 21 So what is simulcasting? It's 22 radio. The only significant difference is that 23 you'll hear it over the Internet rather than 24 over the air. And thus it has everything that 25 radio has.</p>

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154	<p>1 Now, every other service in this</p> <p>2 proceeding is claiming to be radio.</p> <p>3 Simulcasting really is. It has the same on-air</p> <p>4 hosts and personalities that keep you company.</p> <p>5 It has the same connection to the local</p> <p>6 community, providing local news, traffic,</p> <p>7 weather, discussions of community events and</p> <p>8 emergency information in a crisis. And yes, it</p> <p>9 does have the same music introduced and</p> <p>10 promoted by the same trusted DJs whose</p> <p>11 endorsements the major record companies go to</p> <p>12 enormous lengths to obtain, as even Mr.</p> <p>13 Pomerantz concedes.</p> <p>14 So music is a part of radio and of</p> <p>15 simulcasting. But unlike most of the services</p> <p>16 in the benchmark and target markets that will</p> <p>17 be discussed here in this proceeding,</p> <p>18 simulcasting is not just a music service.</p> <p>19 You won't hear much about</p> <p>20 simulcasting in SoundExchange's presentation.</p> <p>21 It doesn't fit into SoundExchange's theory of</p> <p>22 the case. The foundation of SoundExchange's</p> <p>23 case is that customized Webcasting substitutes</p> <p>24 for other record company revenue streams, is</p> <p>25 not promotional of sound recording sales, is</p>	156	<p>1 widely among simulcasters. And the right to</p> <p>2 play music is not what differentiates radio</p> <p>3 stations.</p> <p>4 SoundExchange's own witnesses</p> <p>5 recognize the difference between simulcasting</p> <p>6 and other forms of Webcasting.</p> <p>7 For example, SoundExchange's first</p> <p>8 witness tomorrow will be Dennis Kooker of</p> <p>9 Sonny. His written direct testimony draws what</p> <p>10 he calls a fundamental distinction -- those are</p> <p>11 his words -- between streaming services</p> <p>12 mirroring terrestrial radio and services</p> <p>13 enabling customized music access.</p> <p>14 Of course simulcasting mirrors</p> <p>15 terrestrial radio. And it is still</p> <p>16 fundamentally distinct from on-demand services.</p> <p>17 There is more that I'll be able to</p> <p>18 discuss in closed session regarding what</p> <p>19 SoundExchange's witnesses have said, but they</p> <p>20 were mostly said in depositions, which the</p> <p>21 parties are still treating as restricted. So</p> <p>22 I'll reserve that.</p> <p>23 But the key point is that even the</p> <p>24 evidence from SoundExchange --</p> <p>25 CHIEF JUDGE BARNETT: To be sure the</p>
155	<p>1 not like radio, and has functions that are</p> <p>2 converging with interactive on-demand services.</p> <p>3 Whatever the validity of that thesis</p> <p>4 for custom Webcasting -- and I'm confident that</p> <p>5 the other services will have something to say</p> <p>6 about that -- the evidence will show that</p> <p>7 SoundExchange's premises are simply false for</p> <p>8 simulcasting.</p> <p>9 As NAB's witnesses will explain,</p> <p>10 simulcasting is not customized. It is not</p> <p>11 influenced by the user. It is the same program</p> <p>12 for everyone chosen by the broadcaster. It is</p> <p>13 not converging with on-demand streaming. It is</p> <p>14 just like radio.</p> <p>15 It does not substitute for CD sales</p> <p>16 or downloads. It promotes them. And there is</p> <p>17 no evidence that it substitutes for</p> <p>18 subscription on-demand streaming.</p> <p>19 And the music that a station decides</p> <p>20 to play is only part of the reason that</p> <p>21 listeners choose simulcasts of their favorite</p> <p>22 radio stations.</p> <p>23 If you really wanted to listen to</p> <p>24 just music, there are lots of other places to</p> <p>25 find it. Moreover, the use of music varies</p>	157	<p>1 folks in the back can hear, can you move that</p> <p>2 microphone, just to get closer. Is that okay?</p> <p>3 MR. JOSEPH: Sure.</p> <p>4 CHIEF JUDGE BARNETT: Great.</p> <p>5 Thanks.</p> <p>6 MR. JOSEPH: Or I can even, perhaps</p> <p>7 easier, move myself a bit closer to the</p> <p>8 microphone.</p> <p>9 The key point is that the evidence</p> <p>10 from SoundExchange will be that simulcasting is</p> <p>11 different and different in ways that matter for</p> <p>12 setting rates.</p> <p>13 Now, NAB's fact witnesses will not</p> <p>14 be a parade of lawyers, like three of the four</p> <p>15 major label witnesses. Rather, you will hear</p> <p>16 from real broadcasters who will tell you about</p> <p>17 the industry to which they have devoted their</p> <p>18 professional lives, broadcasters such as John</p> <p>19 Dimick, senior vice president of programming</p> <p>20 and operations of Lincoln Financial Media, has</p> <p>21 35 years in the radio industry; Robert Kocak,</p> <p>22 the vice president of program development at</p> <p>23 Greater Media, who was known professionally as</p> <p>24 Buzz Knight, and is another 35-plus-year</p> <p>25 veteran of the industry; Steve Newberry, the</p>



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158	<p>1 chief executive officer of Commonwealth 2 Broadcasting of Kentucky, who began his career 3 in radio at the age of 14, worked on the air in 4 high school and college, and later founded 5 Commonwealth almost 20 years ago; Julie Koehn, 6 the president and general manager of Hemingway 7 Broadcasting in Adrian, Minnesota, who has held 8 her current position for 25 years; Ben Downs, 9 the vice president and general manager of Bryan 10 Broadcasting of College Station, Texas, who has 11 over 45 years' experience in radio; and Johnny 12 Chiang, who heads up Cox Radio's country 13 stations in the Houston, Texas market. 14 On the buyer side of the willing 15 buyer/willing seller standard, Mr. Dimick and 16 Mr. Downs will testify that simulcast streaming 17 is not profitable for their companies and never 18 has been, primarily due to the cost of sound 19 recording royalties; and the fact that, despite 20 their efforts, advertisers simply are not 21 willing to pay significant amounts for ads on 22 their streams. That, of course, dramatically 23 affects what a buyer would be willing to pay. 24 NAB witnesses will also describe how 25 the success of a radio station, even a</p>	160	<p>1 that offer only music programming. And 2 contrary to Mr. Huffy's assertion that you'll 3 see in his written direct testimony, that, with 4 simulcasting, as with radio, it's not, quote 5 all about the music, close quote. 6 Now, Ms. Koehn and Mr. Newberry will 7 also highlight the importance of their 8 station's community programming and community 9 service. 10 Ms. Koehn will explain how she would 11 like to better serve her station's community by 12 providing access to its programming online but 13 has decided not to do so primarily due to sound 14 recording royalties. Because her station is 15 not streamed, her community loses, and the 16 public loses. 17 Mr. Dimick and Mr. Knight will -- 18 and others will provide -- will also describe 19 the enormous promotional benefit and the 20 promotional value that radio broadcasts provide 21 to artists and record labels and how labels and 22 artists undertake extensive efforts to cause 23 broadcasters to play their recording. 24 And as Mr. Dimick will explain, the 25 context of the simulcast stream is the same as</p>
159	<p>1 music-formatted radio station, does not depend 2 primarily on music. All stations have access 3 to the same music. 4 Rather, success depends primarily on 5 how the station differentiates itself from 6 other radio stations by developing a 7 relationship with its listeners through on-air 8 personalities, community programming and 9 community outreach, among other things. 10 That testimony will be supported by 11 ordinary course of business documents and 12 studies showing that programming elements other 13 than music, including the ones I've just 14 mentioned, contribute much of the value of 15 radio programming. That should be contrasted 16 with services offering only music programming. 17 In addition, NAB will present the 18 results of a commission survey by Professor 19 Dominique Hanssens, distinguished professor of 20 marketing at UCLA. That survey, his survey, 21 confirms that the importance of nonmusic 22 programming on radio also applies to 23 simulcasting. 24 The evidence will thus show that 25 simulcasting should be contrasted with services</p>	161	<p>1 the content of the broadcast; thus, ear for 2 ear, it provides the same promotional benefits 3 to record companies and artists. 4 The value of the record company -- 5 the value to the record companies of radio 6 airplay is confirmed in industry studies and by 7 the record companies' own behavior and as 8 reflected in the labels' own testimony and 9 documents. 10 Mr. Pomerantz concedes this is true. 11 He could scarcely do otherwise. 12 Numerous industry studies show the 13 importance of radio for music discovery. Radio 14 is the primary source of music discovery. And 15 if you don't discover it, you don't buy it. 16 Declarations submitted in this case 17 by high-level executives of all three major 18 labels, in their efforts to avoid discovery 19 from their radio promotion departments, stated 20 that their companies had multiple promotion 21 departments employing hundred of people in the 22 aggregate whose job it was to try to get their 23 recordings on the radio. 24 NAB will also present evidence of 25 the large sums of money that the record</p>

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162	<p>1 companies spend to promote their recordings to 2 radio. And there's a simple economic fact. If 3 it weren't worth it to them, they wouldn't 4 spend that money. 5 Now, there's a bit more that I'll 6 discuss in closed session, but we'll come back 7 to that. 8 And as I will discuss shortly, this 9 promotional benefit would be reflected in an 10 effectively competitive market by lower royalty 11 rates. 12 Now, as we've all been waiting for, 13 to the economics. 14 In addition to its broadcaster 15 witnesses, NAB will present the expert 16 testimony of Professor Michael Katz from the 17 University of California at Berkeley. You'll 18 notice there seems to be a surfeit of Berkeley 19 economists in this case, and we have ours. 20 He's a leading expert in the 21 economics of industrial organization, which 22 includes the study of competition and pricing 23 as well as antitrust and regulatory policy. 24 Professor Katz has served as the 25 chief economist of the Federal Communications</p>	164	<p>1 ignores it. 2 Professor Katz will testify that 3 economists have long recognized the value of 4 competition. Under competitive conditions, 5 consumers benefit, and the net welfare of 6 society's resources are maximized. Competition 7 among sellers gives consumers, both businesses 8 and individuals, the benefits of lower prices, 9 higher quality products and services, more 10 choices and greater innovation. 11 Professor Katz will describe how, in 12 an effectively competitive market, prices are 13 driven down towards -- not to but towards 14 sellers' marginal costs. And those costs 15 include what economists call opportunity costs, 16 the affect of a sale or a license on the other 17 revenue streams of a seller. 18 For example, where a buyer's 19 activity substitutes for other sales and thus 20 reduces the seller's other revenues, a seller 21 in a competitive market will charge that buyer 22 more. 23 Professor Katz will testify that 24 opportunity cost can also be negative. Think 25 of it as opportunity benefits. And when that</p>
163	<p>1 Commission and more recently as the top 2 economist at the Justice Department, a position 3 responsible for merger and nonmerger 4 competition analysis and enforcement. 5 Your Honors have recognized that the 6 goal of this exercise that we're embarked upon 7 is to set prices that would exist in a 8 hypothetical, effectively competitive market 9 for sound recording devices. That standard is 10 central to this entire case. 11 The evidence will show that the 12 services embrace it. SoundExchange does not. 13 You will be able to contrast the 14 presentations of Professor Katz, who elaborates 15 on the economic significance of effectively 16 competitive markets and why they are the 17 paradigm that rate setting should strive to 18 achieve. 19 We'll be able to contrast that with 20 the testimony of SoundExchange's lead 21 economist, Professor Daniel Rubinfeld, who in 22 his direct testimony, the testimony in which he 23 develops SoundExchange's rate proposal, never 24 even once mentions the need for rates to 25 reflect an effectively competitive market. He</p>	165	<p>1 happens, that will reduce the amount that a 2 seller in an effectively competitive market 3 will charge, for example, where a buyer's 4 activity, such as simulcast streaming, promotes 5 other revenue streams of the seller. 6 Professor Katz will explain that, if 7 you are comparing license fees for two 8 different types of services, you must account 9 for these differences in opportunity costs and 10 benefits. It is not enough to suggest, as Mr. 11 Pomerantz, did that the interactive agreements 12 internalize the promotional and substitutional 13 effects of interactive services without 14 considering any differences between interactive 15 and noninteractive services in that regard. 16 Now, Professor Katz will explain the 17 hallmark of competition is that buyers have the 18 ability to substitute the offerings of one 19 seller for another. That's what competition is 20 all about. It is this possibility of 21 substitution that drives sellers to offer 22 higher quality and lower prices in order to 23 attract buyers to themselves rather than their 24 rivals. 25 I was struck by how well Mr.</p>

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166	<p>1 Pomerantz himself put it. That's what 2 competitors do. They try to take customers 3 away from each other. 4 But a market where that kind of 5 rivalry, that kind of substitution does not 6 exist is not a competitive market. Simplest 7 case should go without saying that a 8 monopolized market is not competitive. There 9 are no sellers to compete with a monopoly. 10 Moreover, as Professor Katz will 11 show, a monopolized market does not become 12 effectively competitive even if, contrary to 13 the facts here, a buyer has its own market 14 power facing a monopoly. That's just not 15 competition. 16 And as Your Honors recognized in Web 17 III, and as Professor Katz will testify, 18 suppliers of what economists call complementary 19 products do not compete with each other. 20 Indeed, economics tells us that the sellers of 21 complementary products will actually set price 22 that, in the aggregate, exceed even those of a 23 monopolist. 24 Now, the primary benchmark on which 25 Professor Rubinfeld and SoundExchange seem to</p>	168	<p>1 Dr. Rubinfeld's analysis that are not so easily 2 quantified. But I'll come back to that. 3 Let's start with the overarching 4 issue of competition. 5 In Web III, Your Honors observed 6 that the parties had not presented evidence to 7 enable you to decide whether the catalogs of 8 the major record companies were complements or 9 substitutes. Well, you now have that evidence. 10 And you have it specifically for the very 11 interactive service licenses on which 12 SoundExchange is purporting -- attempting to 13 relay in this case. The major record labels' 14 catalogs are complements they do not compete. 15 In Mr. Pomerantz's words, they do not try to 16 take customers away from each other. 17 You'll hear the testimony of 18 Professor Rubinfeld in this case that the 19 repertoires of the majors are complements. And 20 then, as Mr. Rich alluded to in his opening -- 21 in fact, he showed me some of the language, and 22 I'll show you more in our closed session -- we 23 have extensive evidence from the mouths of 24 Universal Music Group and Professor Rubinfeld 25 himself when they successfully advocated to the</p>
167	<p>1 rely in this case is the same one on which 2 SoundExchange primarily relied in Web II and 3 again relied upon in Web III, licenses in which 4 the major record companies licensed interactive 5 on-demand streaming services. 6 Professor Katz will demonstrate 7 these agreements are decidedly not the result 8 of competitive forces, and as a result, that 9 SoundExchange's benchmark is not a sound basis 10 for rate setting. 11 He will then demonstrate the serious 12 methodological flaws in Dr. Rubinfeld's 13 analysis, even taking it at its own word on its 14 face, resulted in a severe overstatement of the 15 rates that are implied even by that 16 noncompetitive benchmark. 17 Indeed, correcting for just the 18 easily quantifiable errors committed by 19 Professor Rubinfeld, Professor Katz shows that 20 the interactive benchmark would result in a 21 rate of .06 cents per performance, not the 22 \$.026 per performance that Professor Rubinfeld 23 claims is what it shows. 24 And that rate doesn't even reflect 25 adjustments for the numerous other flaws in</p>	169	<p>1 Federal Trade Commission that it should approve 2 the proposed merger between -- that it was 3 investigating between UMG and EMI, two of the 4 then four major labels. 5 We also have the evidence presented 6 to the FTC by Mr. Pomerantz as counsel to 7 Universal. And the evidence presented to the 8 FTC is clear: that the catalogs of the major 9 record companies are complements for the 10 interactive services. To be viable, the 11 services must have licenses from all of the 12 majors and, the evidence suggests, the larger 13 independents. And I don't use that word "must 14 have" lightly. It is all over the evidence 15 that you will see in this case. 16 Now, the interactive services must 17 have each of the majors. The majors don't 18 compete. And the license fees they charge are 19 not effectively competitive. 20 And indeed, as you have recognized, 21 economics tells us that complements will, in 22 the -- sellers of complementary product will, 23 in the aggregate, charge more than even a 24 monopoly seller of all of the rights. And 25 there is no way you can construe that as an</p>

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170	<p>1 effectively competitive price.</p> <p>2       What was the FTC doing when it</p> <p>3 looked at the Universal/EMI merger? It was</p> <p>4 reviewing the merger to determine whether it</p> <p>5 would lessen the competition in any market,</p> <p>6 including the market in which the record</p> <p>7 companies license interactive services.</p> <p>8       The FTC approved the merger,</p> <p>9 concluding that it would not lessen competition</p> <p>10 because -- and this is worth reading -- in the</p> <p>11 words of the FTC, commission staff found</p> <p>12 considerable evidence that each leading</p> <p>13 interactive streaming service must carry the</p> <p>14 music of each major to be competitive. Because</p> <p>15 each major currently controls recorded music</p> <p>16 necessary for these streaming services. The</p> <p>17 music is more complementary than substitutable</p> <p>18 in this context, led to limited competition</p> <p>19 between UMG and EMI.</p> <p>20       In other words -- and frankly,</p> <p>21 really ironically -- the merger -- FTC found</p> <p>22 that the merger wouldn't lessen competition in</p> <p>23 licensing interactive services because there</p> <p>24 simply was no competition to lessen.</p> <p>25       Now, the FTC didn't reach that</p>	172
171	<p>1 existence of some give and take doesn't mean</p> <p>2 that a market is competitive.</p> <p>3       And Mr. Pomerantz also argues that</p> <p>4 its relevant that the major record companies</p> <p>5 would have the same market power, would also be</p> <p>6 must-haves, in licensing statutory services.</p> <p>7       Now, we'll have a legal dispute</p> <p>8 about the significance of that that I don't</p> <p>9 want to get into in my opening. But the</p> <p>10 economic evidence will show that a hypothetical</p> <p>11 market in which the record companies don't</p> <p>12 compete cannot be construed as a hypothetical</p> <p>13 effectively competitive market, which is the</p> <p>14 task that you all are settling.</p> <p>15       Now, Professor Katz will also</p> <p>16 demonstrate that the lack of effective</p> <p>17 competition is not the only problem with</p> <p>18 Dr. Rubinfeld's analysis of the interactive</p> <p>19 services benchmark on which SoundExchange</p> <p>20 relies.</p> <p>21       Dr. Rubinfeld committed serious</p> <p>22 methodological errors that inflated his</p> <p>23 recommended rate by a factor of over four and a</p> <p>24 half. Adjusting for only the easily</p> <p>25 quantifiable errors, Professor Katz will</p>	173
171	<p>1 conclusion sua sponte. Universal, Professor</p> <p>2 Rubinfeld and Mr. Pomerantz proved it to them.</p> <p>3 And indeed, the documents submitted by those</p> <p>4 folks to the FTC are compelling. And I will</p> <p>5 discuss them in greater detail in a closed</p> <p>6 session.</p> <p>7       But now that we have this evidence,</p> <p>8 it demonstrates that there is no economic</p> <p>9 validity to SoundExchange's primary benchmark</p> <p>10 in this case because the licenses are not the</p> <p>11 result of an effectively competitive market.</p> <p>12       Now, Mr. Pomerantz suggested that</p> <p>13 there will be evidence that counters the</p> <p>14 showings that they made to the FTC. That</p> <p>15 piracy imposes some constraints on the price</p> <p>16 that downstream services can charge.</p> <p>17       But the evidence will show,</p> <p>18 Professor Katz will testify, that the fact that</p> <p>19 there may be some downstream constraint doesn't</p> <p>20 mean that the upstream market is competitive.</p> <p>21       Mr. Pomerantz says the evidence will</p> <p>22 show that there are negotiations between major</p> <p>23 record companies and services. But as even</p> <p>24 Dr. Rubinfeld admits, even monopolists engaged</p> <p>25 in negotiations with their customers. The</p>	173
171	<p>1 demonstrate that the interactive benchmark,</p> <p>2 even only partially corrected, points to a rate</p> <p>3 of .06 cents per performance, not the \$.026</p> <p>4 claimed by Dr. Rubinfeld.</p> <p>5       Professor Katz will show that</p> <p>6 Dr. Rubinfeld's assumption that interactive and</p> <p>7 statutory services were paid the same</p> <p>8 percentage of their revenue, an assumption that</p> <p>9 was essential to Dr. Rubinfeld's analysis, was</p> <p>10 wholly unsupported by Dr. Rubinfeld and lacks</p> <p>11 any economic validity.</p> <p>12       Simply changing that assumption to a</p> <p>13 more economically supportable assumption that</p> <p>14 the two services -- two types of services will</p> <p>15 pay the same percentage of their profits</p> <p>16 results -- rather than revenues results in the</p> <p>17 dramatic reduction of the license fees implied</p> <p>18 by Dr. Rubinfeld's interactive benchmark.</p> <p>19       Professor Katz will also demonstrate</p> <p>20 that Dr. Rubinfeld failed properly to account</p> <p>21 for the fact that interactive service benchmark</p> <p>22 license fees are largely driven by subscription</p> <p>23 revenues and that statutory services are</p> <p>24 overwhelmingly nonsubscription.</p> <p>25       Professor Katz will demonstrate</p>	173

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174	<p>1 that, if you account for the different revenues 2 earned by subscription an nonsubscription 3 services in a way that properly reflects the 4 mix between the two types of services, 5 interactive and noninteractive, you 6 dramatically reduce the license fee implied for 7 nonsubscription services by Dr. Rubinfeld's 8 interactive benchmark.</p> <p>9 Professor Katz will also show that 10 Dr. Rubinfeld inflated his benchmark rate by 11 artificially overweighting the higher royalty 12 bearing rate and unweighting the lower royalty 13 performances. And if you just correct for 14 those three, as Professor Katz shows, using 15 Dr. Rubinfeld's own data, you wind up with a 16 recommended rate of .06 cents per performance. 17 You actually will have the tools to do that if 18 you want to.</p> <p>19 And that still doesn't correct for 20 the numerous other flaws in Dr. Rubinfeld's 21 analysis that inflate his proposed rate but 22 that are more difficult to quantify. Professor 23 Katz discusses these additional flaws in 24 detail. I've already talked about the lack of 25 effective competition in the benchmark market.</p>	176	<p>1 But first what does he do? First he 2 highlights the economic value of the 3 promotional benefits conferred by simulcasting 4 on record companies and artist and concludes 5 that they would drive competitive license rates 6 for simulcasting down to very low levels.</p> <p>7 Now, Mr. Pomerantz, for a reason I 8 don't understand, mischaracterized what Dr. 9 Katz said. He did not say that, "I'm going to 10 rely on the fact that there's a statutory zero 11 rate for terrestrial ratio." He specifically 12 looked at the market behavior of the 13 participants related to radio to conclude that 14 the evidence suggested that, if there were such 15 a market, the rates would be very close to 16 zero.</p> <p>17 He also considers the possible use 18 of the rates that Your Honors set in the most 19 recent satellite radio case as a benchmark and 20 concludes that the 13 percent of revenue rate 21 used in that case, which was based in large 22 measure on the flawed interactive service 23 benchmark, exceeds the upper bounds of the 24 reasonable rate. Those were the bounds he set 25 in his direct testimony.</p>
175	<p>1 Also, Professor Katz testifies to 2 the fact that interactive services are more 3 substitutional and less promotional of other 4 record companies' revenues streams than 5 statutory services in general and simulcasting 6 in particular.</p> <p>7 Those differences, those differences 8 in opportunity costs, would be reflected in 9 pricing in an effectively competitive market.</p> <p>10 And finally, Dr. Rubinfeld fails to 11 account for the differences in the relative 12 contribution of music to all music-on-demand 13 services and part-music simulcasting. We've 14 already talked about that a little bit. In 15 other words, even the .06 cents per-performance 16 rate is conservative.</p> <p>17 In his direct testimony, Professor 18 Katz reaches a similar conclusion -- it'll be a 19 while before you hear that -- estimating limits 20 on the bounds of reasonable rates. He actually 21 doesn't, as Mr. Pomerantz said, actually give 22 you the bounds of reasonable rates. He gives 23 you numbers that he believes are beyond the 24 bounds of reasonable rates so that you're 25 inside of that.</p>	177	<p>1 Now, NAB will also present expert 2 testimony that Dr. Rubinfeld's reliance on a 3 survey performed by Professor McFadden, as 4 mentioned by Mr. Pomerantz, to corroborate his 5 interactivity adjustment, is misplaced.</p> <p>6 Professor John Hauser, the Kirin 7 professor of marketing at MIT's Sloan School of 8 Management, will testify that Dr. McFadden's 9 survey data are not reliable.</p> <p>10 Among other flaws, Professor Hauser 11 will testify that the survey relied on 12 complicated feature descriptions that were 13 long, overlapping, jargon heavy, and prone to 14 confusion, requiring careful evaluation of the 15 Respondent's understanding, and evaluation of 16 Professor McFadden failed to implement.</p> <p>17 Professor Hauser will testify that 18 his qualitative study of those featured 19 descriptions indicated that the vast majority 20 of respondents likely were confused by one or 21 more of Professor McFadden's feature 22 definitions.</p> <p>23 NAB will also present, along with 24 Pandora -- and by the way, NAB is presenting 25 Professor Hauser along with iHeart.</p>

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178	<p>1 We're also presenting, along with 2 Pandora, Dr. Steven Peterson, an expert 3 economist who also specializes in industrial 4 organization. And he will testify that 5 Professor Rubinfeld misuses the results of 6 Professor McFadden's survey. 7 Dr. Peterson will demonstrate that 8 Professor McFadden estimates of the average 9 consumer willingness to pay for the features 10 that he tested mask great individual divergence 11 and cannot be used to provide insight into 12 market price or how consumers would respond to 13 market prices. 14 Dr. Peterson will also respond to 15 SoundExchange's witness Dr. David Blackburn and 16 demonstrate that Dr. Blackburn's claims that 17 the Webcasting industry is healthy and that 18 existing rates are not choking off growth based 19 on -- I'm sorry -- are not choking off growth 20 are based on unsound economics and lack 21 evidentiary support. 22 He will testify that even a 23 monopolist would not choke off growth. So Dr. 24 Blackburn's standard is meaningless to the -- 25 in this case.</p>	180	<p>1 tax on revenue attributed to or enhanced by 2 nonmusic elements of a service would diminished 3 the incentive to improve those nonmusic 4 elements. 5 Second, SoundExchange's proposed 6 percentage of revenue fee runs counter to the 7 statutory mandate that license fees reflect the 8 relative value of each party's contribution to 9 the overall value of the service. 10 Enhancements of the service that 11 increase revenue but do not arise from the 12 right to perform sound recordings are 13 contributed by the service and shouldn't be 14 subject to a percentage of revenue fee paid to 15 the recording industry. 16 Third, allocation of revenue among 17 programming elements for different simulcasters 18 whose use of music varies widely would present 19 serious practical obstacles. Dr. Rubinfeld 20 even acknowledged the need to make such 21 allocations but didn't offer any means of doing 22 so. 23 And SoundExchange's rate proposal, 24 while it proposes certain other allocations, is 25 wholly silent about any allocation with respect</p>
179	<p>1 The evidence will also show that 2 SoundExchange receipts are overwhelmingly from 3 two services. And one of them, SiriusXM 4 satellite radio, for their satellite 5 operations, isn't even Webcasting. So the 6 claims of the health of the market are grossly 7 overstated. 8 Professor Katz's rebuttal testimony 9 also describes how the flaws in Professor 10 Rubinfeld's per-performance rate proposal also 11 infect the percentage of revenue problem of his 12 fee proposal. 13 But more fundamentally, Professor 14 Katz -- more fundamentally, Dr. Katz will 15 testify that Dr. Rubinfeld's proposed 16 greater-of fee structure that includes the 17 percentage of revenue is economically unsound, 18 inconsistent as a matter of economics with the 19 statutory standard, and would be difficult to 20 administer, particularly for simulcasters. 21 SoundExchange's proposed percentage 22 of revenue fees distort the incentives to 23 innovate and improve elements of the service 24 other than sound recording rights. Allowing 25 the recording industry to impose a significance</p>	181	<p>1 to the use of music and the value of nonmusic 2 programming. 3 NAB will also present Professor 4 Roman Weil, professor emeritus of accounting at 5 the University of Chicago's, Booth School of 6 Business, who will testify that, from an 7 accounting standpoint, the percentage of 8 revenue fee as proposed by SoundExchange is not 9 appropriate and that it is particularly 10 inappropriate for simulcasting. 11 He will describe the intractable 12 difficulties for revenue allocation the 13 percentage-of-revenue fee would impose on 14 simulcasters that sell advertising in bundles 15 that include elements that are subject to -- 16 those bundles include elements that are subject 17 to the statutory license and elements that 18 aren't subject to the statutory license. 19 He will also testify, based on years 20 of experience, that there is no clearly correct 21 way to allocate revenue and that revenue-based 22 fees in this context will inevitably result in 23 disputes, costs, and controverts, including the 24 cost of performing the allocation, the cost of 25 audits and the cost of potential litigation.</p>

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182	<p>1 He offers his opinion that the best</p> <p>2 way to avoid these intractable problems is, in</p> <p>3 his words, simply sticking with the current</p> <p>4 per-play royalty structure for simulcasters.</p> <p>5 Now, following the disclosure of the</p> <p>6 merger documents evidencing the lack of</p> <p>7 competition for licenses in interactive</p> <p>8 services, SoundExchange belatedly attempts,</p> <p>9 through Dr. Rubinfeld and only through</p> <p>10 Dr. Rubinfeld, introducing new benchmark,</p> <p>11 certain agreements between Apple and two of the</p> <p>12 major labels for its iTunes Radio services.</p> <p>13 Professor Katz will show that the</p> <p>14 reliance on the Apple agreements is not</p> <p>15 reasonable, most obviously because Professor</p> <p>16 Rubinfeld relies entirely on retrospect of</p> <p>17 analysis and claims that the licenses reflect a</p> <p>18 rate that is substantially higher than the</p> <p>19 statutory rate, a rate that he and other</p> <p>20 SoundExchange witnesses correctly argue, at</p> <p>21 least when they're not talking about Apple,</p> <p>22 that no service that qualified for the</p> <p>23 statutory license would ever willingly pay. In</p> <p>24 other words, Professor Rubinfeld's analysis</p> <p>25 shows that the proposal is absurd on its face.</p>
183	<p>1 Professor Katz will identify</p> <p>2 numerous flaws in Dr. Rubinfeld's analysis in</p> <p>3 the Apple agreement, including Dr. Rubinfeld's</p> <p>4 inappropriate ex post reliance on unexpected</p> <p>5 results rather than the parties' expectations</p> <p>6 at the time they entered into the agreements;</p> <p>7 Dr. Rubinfeld's inclusion of significant</p> <p>8 payments in the numerator of his calculation of</p> <p>9 a per-play rate that should not have been</p> <p>10 included; his exclusion of significant numbers</p> <p>11 of performances in the denominator of his</p> <p>12 calculation of the per-play rate that should</p> <p>13 actually have been included.</p> <p>14 As Professor Katz will testify, a</p> <p>15 partially corrected analysis reveals that, far</p> <p>16 from confirming the reasonableness of the</p> <p>17 interactive services benchmark, the iTunes</p> <p>18 Radio agreement show that that benchmark is</p> <p>19 unreasonably high by a very significant amount.</p> <p>20 Moreover, Professor Katz will</p> <p>21 explain that there are important additional</p> <p>22 factors that bias Dr. Rubinfeld's analysis</p> <p>23 upward to a significance degree, rendering the</p> <p>24 Apple benchmarks an invalid benchmark.</p> <p>25 Professor Katz also discusses</p>
184	<p>1 whether the existing statutory rates provide a</p> <p>2 reasonable basis for fee setting. And he</p> <p>3 concludes that they do not.</p> <p>4 He will testify that the existing</p> <p>5 rates as set in Web III, as Your Honor knows</p> <p>6 are the direct result of what we believe will</p> <p>7 be the discredited interactive service</p> <p>8 benchmark, and certain Webcaster Settlement Act</p> <p>9 agreements that were themselves the products of</p> <p>10 the rates set in Web II -- but the rates set in</p> <p>11 Web II were, in turn, the result of again what</p> <p>12 we believe will be the discredited interactive</p> <p>13 service benchmark.</p> <p>14 In other words, Dr. Katz will</p> <p>15 testify that today's rates are a direct result</p> <p>16 of Web II and the invalid interactive services</p> <p>17 benchmark on which SoundExchange has</p> <p>18 consistently relied.</p> <p>19 Moreover, Professor Katz will</p> <p>20 identify methodological errors and other flaws</p> <p>21 with SoundExchange's interactive service</p> <p>22 benchmark analysis in Web II. The invitation</p> <p>23 is not to relitigate Web II but to show, with</p> <p>24 evidence that we now have, that the rate that</p> <p>25 sprang forth from Web II, which have brought us</p>
185	<p>1 where we are today, are not a reasonable basis</p> <p>2 to look forward.</p> <p>3 Among other things, for example,</p> <p>4 Professor Katz will show how, with the benefit</p> <p>5 of hindsight, it is now clear that</p> <p>6 SoundExchange's Web II expert, Dr. Michael</p> <p>7 Pelcovitz, improperly based his analysis on</p> <p>8 data for a nascent industry that was not in</p> <p>9 equilibrium. Indeed, of the seven interactive</p> <p>10 services of which Dr. Pelcovitz relied for his</p> <p>11 analysis, only one is still in business.</p> <p>12 Now, the evidence will also show</p> <p>13 that the NAB/SoundExchange Webcaster Settlement</p> <p>14 Act Agreement is not a valid benchmark.</p> <p>15 As broadcaster witness Steven</p> <p>16 Newberry, who was part of the negotiating team</p> <p>17 for that agreement, will testify, the agreement</p> <p>18 was the direct result of the outcome of Web II,</p> <p>19 which was viewed as a major setback for</p> <p>20 streaming by broadcasters.</p> <p>21 He will describe how the NAB</p> <p>22 negotiators believed that they entered the</p> <p>23 negotiations with no leverage and that</p> <p>24 broadcasters did not contribute -- consider</p> <p>25 another trip to the CRB, at that time, Your</p>

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186	<p>1 Honor, to be a viable alternative.</p> <p>2 Professor Katz will examine the same</p> <p>3 agreement from the standpoint of economics.</p> <p>4 And he will conclude that it did not reflect</p> <p>5 the outcome of an effectively competitive</p> <p>6 market. He concludes that SoundExchange</p> <p>7 possessed monopoly power, that NAB's decision</p> <p>8 not to litigate was consistent with sound</p> <p>9 economic reasoning, that the precedential</p> <p>10 effect of the agreement further biased the</p> <p>11 rates upward, and more generally that the</p> <p>12 exclusion of other Webcaster Settlement Act</p> <p>13 agreements from consideration creates a</p> <p>14 selection bias that renders the available</p> <p>15 agreements inappropriate to serve as</p> <p>16 benchmarks.</p> <p>17 Professor Katz will also explain why</p> <p>18 the fact that numerous broadcasters signed up</p> <p>19 for the agreement does not speak to whether the</p> <p>20 agreement reflects an effectively competitive</p> <p>21 market. Rather it reflects only that the</p> <p>22 broadcasters perceived that they lacked a</p> <p>23 better alternative.</p> <p>24 As a general matter, the fact that a</p> <p>25 monopolist makes sales to buyers at a monopoly</p>	188	<p>1 proposed by SoundExchange, or SoundExchange's</p> <p>2 proposed greater-of fee, including a percentage</p> <p>3 of revenue, would create intractable</p> <p>4 difficulties, controversy and unwarranted</p> <p>5 costs.</p> <p>6 As a result, license fees for</p> <p>7 simulcasters should be set on a per-performance</p> <p>8 basis and should be at or near the low end of</p> <p>9 any range of reasonable rates.</p> <p>10 NAB submits that the evidence will</p> <p>11 support a rate of .05 cents per performance;</p> <p>12 and that, to the extent there is any percentage</p> <p>13 of revenue-based fee adopted for other</p> <p>14 services, it should not be applied to</p> <p>15 simulcasters.</p> <p>16 Thank you, Your Honor. I'll</p> <p>17 continue with, sometime in the closed session,</p> <p>18 probably about ten more minutes.</p> <p>19 CHIEF JUDGE BARNETT: Thank you.</p> <p>20 I believe iHeart is up next.</p> <p>21 MR. HANSEN: Very briefly, Your</p> <p>22 Honors.</p> <p>23 As I said in our telephone</p> <p>24 conference, iHeart is very eager to make a</p> <p>25 presentation to the Court. But to do so we</p>
187	<p>1 price doesn't mean that the monopoly price is</p> <p>2 competitive. It's as simple as that.</p> <p>3 Now, Dr. Rubinfeld chose not to rely</p> <p>4 on the NAB Webcaster Settlement Act in his</p> <p>5 direct testimony. In his rebuttal he admits</p> <p>6 that the Webcaster Settlement Act Agreements</p> <p>7 were negotiated in a unique context, his words,</p> <p>8 that differs from the hypothetical market at</p> <p>9 issue here. But he does say they are</p> <p>10 nonetheless, in his words, instructive.</p> <p>11 Well, the evidence will show that</p> <p>12 they are instructive only about what a party</p> <p>13 will agree to pay when it perceives that it has</p> <p>14 no realistic alternative. That is not what a</p> <p>15 willing buyer would pay a willing seller in an</p> <p>16 effectively competitive market.</p> <p>17 To summarize, Your Honors, the</p> <p>18 evidence will show that simulcasting has always</p> <p>19 been and is still radio. It is different in</p> <p>20 key respects from other forms of Webcasting.</p> <p>21 It is not customized, and it is not converging</p> <p>22 with interactive service.</p> <p>23 Simulcasting, like radio, is highly</p> <p>24 promotional of record company revenue streams.</p> <p>25 Moreover, a percentage of revenue-based fee as</p>	189	<p>1 need to show the Court what the evidence will</p> <p>2 be. And largely that evidence has been marked</p> <p>3 restricted by the record labels.</p> <p>4 So in this public part of our</p> <p>5 proceeding, I'm only going to say the</p> <p>6 following:</p> <p>7 We are here to propose a very</p> <p>8 different rate. I think Mr. Pomerantz's</p> <p>9 conventional rate of 5, not 25. But we're</p> <p>10 basing it on a record of thick deals in this</p> <p>11 market for the first time before a panel of the</p> <p>12 CRB. Never had that evidence before.</p> <p>13 That evidence, which we'd like to</p> <p>14 show you here, but the record labels won't let</p> <p>15 us show you here, proves our point about these</p> <p>16 deals, that willing buyers and willing sellers</p> <p>17 agree to an incremental price to spend. Why do</p> <p>18 they do that? We're going to prove that to you</p> <p>19 too.</p> <p>20 The word is "promotion." Radio</p> <p>21 promotes. Digital radio industry. And that's</p> <p>22 going to be proved too.</p> <p>23 Again, how are we going to prove it?</p> <p>24 Through the record labels' own documents and</p> <p>25 witnesses. Because they know it as much as we</p>



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190	<p>1 know it. And we can show you their documents, 2 which we can't do in this public setting. They 3 won't let them be shown here. You're going to 4 see they recognize that as well. 5 We also know, and we're going to 6 show you through their documents, that they 7 know these rates that we're paying now are too 8 high. They're strangling an industry. They 9 need to restructure -- restructure broadcaster 10 Webcaster economics in order to have a viable 11 Webcaster industry, which benefits them through 12 promotion. 13 The promotion you're going to hear 14 about in detail in my presentation, which I 15 hope to give today, if we have time, is going 16 to be strongly focused on empirical evidence 17 and their documents showing that we are the key 18 to music discovery. 19 We, the digital broadcasting, the 20 broadcasting, radio industry is absolutely 21 fundamental to the sales of the record 22 industry. And they know it. They just don't 23 want to admit it here. 24 We also know that everything -- or 25 virtually everything the record labels do in</p>	192	<p>1 can get out from under the digital rights 2 people, who are going to choke this off, make 3 these 29 deals that prove to the market price 4 because they want the benefits of promoting; 5 they want the incremental promotional 6 opportunities provided by these market deals. 7 And you're going to see that they 8 are very different in their view of the world 9 from the people whose only perspective is, "How 10 I do keep these rates high, these unjustifiable 11 leveraged rates?" And you'll see that word 12 used. 13 They use rates as leverage because 14 they have the upper hand. They see the rates 15 as essentially effectively set to benefit the 16 record industry. And we're going to show you 17 documents where they say that. 18 So we would like to be able to 19 review all this powerful evidence right here 20 and now, but we can't. We have to follow the 21 rules. I'm very eager to bring that 22 information to you. 23 I'm going to stop now. I'm going to 24 reserve the rest of my time for our restricted 25 session.</p>
191	<p>1 this arena is done with a eye toward how it 2 will play here in this proceeding. They don't 3 do anything without thinking about how it's 4 going to play. 5 And what we're going prove to you -- 6 and I'm going to be done here in a minute -- 7 but I think you're going to see something 8 dramatic and remarkable. 9 There are effectively two camps 10 within the record labels. There's the camp 11 you're going to hear in this courtroom. Those 12 are the digital rights folks, the lawyers. And 13 they're going to tell the story, "Oh, this is 14 basically a world of -- everybody is converging 15 on everybody, and there's only going to be 16 music subscribers, and we just got to scrub 17 every last nickel we can from the subscribers." 18 Then there's the business people on 19 the record labels. They're not coming. But 20 we're going to show you their documents. What 21 the rec -- what the business people are going 22 to tell you is, "We see the benefits of 23 promotion. We wish to expand music sales. We 24 wish to promote new artists." 25 And those business people, when they</p>	193	<p>1 And I thank you very much for your 2 attention and look forward to presenting my 3 full opening statement at that time. 4 CHIEF JUDGE BARNETT: Thank you. 5 Mr. Fakler on behalf of SiriusXM. 6 MR. FAKLER: Good afternoon, Your 7 Honors. 8 SiriusXM will present one witness in 9 that proceeding -- in this proceeding, and that 10 witness will be David Frear. Mr. Frear is the 11 chief financial officer of SiriusXM Radio. 12 And Mr. Frear will testify on three 13 primary points. The first point is that the 14 SiriusXM Webcaster Settlement Act, or WSA 15 settlement agreement, does not accurately 16 reflect the fair market value of the license at 17 issue in this proceeding. 18 And that's because the set of -- 19 that's due to a set of circumstances that 20 SiriusXM found itself in at the time of those 21 negotiations that had nothing to do with the 22 value of the license but dictated the outcome 23 of those negotiations. 24 The second primary point, which 25 flows from the first, is that, in the absence</p>

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194	<p>1 of any other benchmark, and to the extent that</p> <p>2 the judges do look to the WSA settlement rates</p> <p>3 for the purposes of setting the rates in this</p> <p>4 proceeding, the entry point of those rates, the</p> <p>5 first year rate, .16 cents per performance,</p> <p>6 should set the upper bound of any range --</p> <p>7 reasonable range of fair market value.</p> <p>8 And the third primary point to which</p> <p>9 Mr. Frear will testify is that the use of</p> <p>10 percent of revenue to calculate the royalties</p> <p>11 across all types of commercial Webcasters would</p> <p>12 be both unworkable and unfair.</p> <p>13 Turning to the first point relating</p> <p>14 to the SiriusXM WSA settlement agreement.</p> <p>15 SiriusXM's circumstance at the time of that</p> <p>16 negotiation put in a position where its only</p> <p>17 rational option was to accept whatever rates</p> <p>18 were offered by SoundExchange.</p> <p>19 Those rates did represent a</p> <p>20 decrease, after all, to the Web II rates that</p> <p>21 were in effect. And any decrease, however</p> <p>22 slight, was preferable to no decrease or, even</p> <p>23 worse, the cost of another rate proceeding.</p> <p>24 When Sirius -- Sirius and XM,</p> <p>25 because they were separate companies at the</p>	196	<p>1 cause tremendous problems for the entire</p> <p>2 Webcasting market. And for that reason,</p> <p>3 congress got involved with Webcasters</p> <p>4 Settlement Agreement.</p> <p>5 That legislation allowed Webcasters</p> <p>6 and SoundExchange to negotiate reduction to the</p> <p>7 Web II rates and also to come up with rates</p> <p>8 that would roll forward into the Web III rate</p> <p>9 period. So naturally SiriusXM took advantage</p> <p>10 of that legislation and began negotiations with</p> <p>11 SoundExchange.</p> <p>12 But in those negotiations, SiriusXM</p> <p>13 found itself in a perfect storm of</p> <p>14 circumstances having nothing to do with the</p> <p>15 value of the license but which led it to</p> <p>16 inevitably take any rate decrease offered by</p> <p>17 SoundExchange.</p> <p>18 On the one hand, the company was</p> <p>19 suffering extreme financial distress. And on</p> <p>20 the other hand, the low usage of the Internet</p> <p>21 radio service and the low revenues coming from</p> <p>22 the Internet radio service made it such that it</p> <p>23 simply was not worth fighting over.</p> <p>24 Turning first to the financial</p> <p>25 distress element.</p>
195	<p>1 time, when they first introduced their Internet</p> <p>2 radio services, they were essentially</p> <p>3 simulcasting their satellite channels over the</p> <p>4 Internet for free at a lower sound quality.</p> <p>5 And they were doing this largely for promotion.</p> <p>6 The idea was that the free access to the</p> <p>7 reduced quality service would drive</p> <p>8 subscriptions to the satellite service.</p> <p>9 But then in 2007, the copyright</p> <p>10 royalty judges released their determinations in</p> <p>11 the Webcasting II proceeding. That rate</p> <p>12 determination almost tripled the rates during</p> <p>13 the term of that rate period that would be</p> <p>14 applicable to Webcasters.</p> <p>15 In the wake of that massive rate</p> <p>16 increase, SiriusXM phased out the free access</p> <p>17 to their Internet radio service and made it</p> <p>18 available only to subscribers.</p> <p>19 That change led to a drastic</p> <p>20 decrease in usage of the Internet radio</p> <p>21 services. It also led to a drastic decrease in</p> <p>22 the royalties paid to SoundExchange.</p> <p>23 In -- and of course the</p> <p>24 Webcasting II -- drastic increase in the</p> <p>25 Webcasting II rate determination was going to</p>	197	<p>1 At the time of the Web II rate</p> <p>2 determination, both Sirius and XM had endured</p> <p>3 years, year of sustained losses flowing from</p> <p>4 the company's investment of billions of dollars</p> <p>5 into the technology and infrastructure</p> <p>6 necessary to invent, create and grow the</p> <p>7 satellite radio business.</p> <p>8 In 2007, in order to save both</p> <p>9 companies, they announced their intent to</p> <p>10 merge. But that merger wound up taking much</p> <p>11 longer and costing far more money than anyone</p> <p>12 could have anticipated. By the time the merger</p> <p>13 was consummated, the companies have spent</p> <p>14 upwards of \$150 million just on the merger</p> <p>15 costs.</p> <p>16 At the same time, both Sirius and XM</p> <p>17 were participating in the -- spending millions</p> <p>18 of dollar participating in the SDARS I rate</p> <p>19 proceeding.</p> <p>20 Now, this severe financial stress</p> <p>21 didn't just disappear the day after the merger.</p> <p>22 In fact, by late 2008, company found itself</p> <p>23 with insufficient cash to pay hundreds of</p> <p>24 millions of dollars in debt that was going to</p> <p>25 come due in February 2009.</p>

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198	<p>1 Unfortunately, this also coincided</p> <p>2 with the credit crisis of the country. So</p> <p>3 Sirius was unable to find any financing to help</p> <p>4 restructure that debt.</p> <p>5 As the February 2009 deadline</p> <p>6 approaches, the company found itself on the</p> <p>7 brink of bankruptcy and, in fact, was preparing</p> <p>8 filings.</p> <p>9 That bankruptcy was only averted in</p> <p>10 the 11th hour when Liberty Media agreed to</p> <p>11 provide some financing, though at a very high</p> <p>12 cost and on very an onerous terms.</p> <p>13 During that time period, SiriusXM's</p> <p>14 stock price had plummeted. It went from \$4 a</p> <p>15 share in January of 2007 to only \$0.05 a share</p> <p>16 in February 2009, which of course was right</p> <p>17 before the WSA negotiations occurred.</p> <p>18 And even shortly after the</p> <p>19 negotiations were finished, in September 2009,</p> <p>20 the company received a delisting notice from</p> <p>21 NASDAQ because its stock had been trading at</p> <p>22 such a low rate for so long.</p> <p>23 So the bottom line is that, in the</p> <p>24 period leading up to the negotiations, during</p> <p>25 the negotiations, and even directly after the</p>	200
199	<p>1 negotiations, SiriusXM was experiencing</p> <p>2 profound financial distress. But at the same</p> <p>3 time, the Internet radio service, which the</p> <p>4 negotiations were about, was experiencing very,</p> <p>5 very low usage, very low revenue.</p> <p>6 The Internet radio service for</p> <p>7 SiriusXM has always been an ancillary extension</p> <p>8 of its satellite radio service. Only a tiny</p> <p>9 fraction of SiriusXM's subscribers ever listen</p> <p>10 to the Internet radio service, and that was</p> <p>11 certainly true back then.</p> <p>12 In fact, at the time of these</p> <p>13 negotiations, even as the rates had been</p> <p>14 dropped to zero, the cost savings would not</p> <p>15 have justified a rate proceeding before the</p> <p>16 copyright royalty judges.</p> <p>17 Also, before SiriusXM began</p> <p>18 negotiations with SoundExchange, the NAB had</p> <p>19 already concluded its WSA. And that agreement</p> <p>20 was designated as presidential.</p> <p>21 So SoundExchange was unwilling to</p> <p>22 materially move off of the rates it had</p> <p>23 established in the NAB agreement. At the end</p> <p>24 of the day though, the terms that were offered</p> <p>25 to SiriusXM did provide some rate relief at a</p>	201
	<p>1 time when the company was undergoing tremendous</p> <p>2 financial stress.</p> <p>3 Because of all of these</p> <p>4 circumstances, the only rational business</p> <p>5 decision that SiriusXM could make was to take</p> <p>6 whatever rate decrease it could get, however</p> <p>7 slight. The only real alternatives were</p> <p>8 staying with the higher Web II rates that were</p> <p>9 already in effect or enduring an expensive rate</p> <p>10 proceeding.</p> <p>11 And that flows to the second part of</p> <p>12 my point of Mr. Frear's testimony, which is</p> <p>13 that, given that the WSA rates were necessarily</p> <p>14 higher than what fair market value would have</p> <p>15 been back then, to the extent those rates are</p> <p>16 considered in this proceeding, at best they</p> <p>17 should establish the upper bounds of a</p> <p>18 reasonable range of fair market value.</p> <p>19 And we note that, while the judges</p> <p>20 did use these rates in the Web III remand as</p> <p>21 one benchmark for setting the current rates for</p> <p>22 commercial Webcasters, of course in that</p> <p>23 proceeding the judges didn't have the benefit</p> <p>24 of any testimony or evidence from either NAB or</p> <p>25 SiriusXM on the context, valuation and</p>	
	<p>1 negotiation of those agreements.</p> <p>2 Turning finally to the third, which</p> <p>3 is a percentage of revenue. The use of</p> <p>4 percentage of revenue to calculate the rate for</p> <p>5 all commercial Webcasters would be both</p> <p>6 unworkable and unfair.</p> <p>7 The commercial Webcasting market is</p> <p>8 a diverse market. There are many commercial</p> <p>9 Webcasters out there. Not all of them are</p> <p>10 Pandora. There are different types. And as</p> <p>11 you heard about the broadcasters when they</p> <p>12 simulcast, and as SiriusXM, which is</p> <p>13 predominantly a simulcasting service as well,</p> <p>14 its satellite service. And then there are all</p> <p>15 sorts of models in between.</p> <p>16 Each of these services have</p> <p>17 different programming philosophies; they have</p> <p>18 different cost structures; they have different</p> <p>19 features and functionality; they have different</p> <p>20 business models.</p> <p>21 There's just no one-size-fits-all</p> <p>22 way to calculate a percentage of revenue metric</p> <p>23 that could be fairly applied across that broad</p> <p>24 spectrum of services.</p> <p>25 For example, with respect to</p>	

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202	<p>1 SiriusXM, it bundles its Internet radio service 2 along with the satellite radio service. Very 3 few of SiriusXM's subscribers subscribe solely 4 to Internet radio services.</p> <p>5 In addition to that, SiriusXM 6 obtains revenue from various other sources 7 completely unrelated to the public performance 8 of sound recordings through the Web. For 9 example, the sale of radios and other 10 equipment.</p> <p>11 But perhaps most importantly, 12 SiriusXM broadcasts a large amount of nonmusic 13 content. And much of that nonmusic content is 14 exclusive content that people can only hear on 15 SiriusXM.</p> <p>16 That's important because the 17 exclusive content of SiriusXM's broadcasts and 18 the wide variety of content it broadcasts, that 19 includes substantial music content, are two key 20 drivers of consumers' willingness to pay 21 subscription fees to SiriusXM, subscriptions 22 fees that they've shown unwillingness to pay 23 for other services.</p> <p>24 It would be manifestly unfair for 25 SiriusXM to have to pay sound recording and</p>	204	<p>1 Instead the judges should stay with 2 the per-performance rate which has the benefit 3 of being directly tied to the usage of the 4 music, is very easy to administer and very easy 5 to account for.</p> <p>6 Thank you.</p> <p>7 CHIEF JUDGE BARNETT: Thank you, Mr. 8 Fakler.</p> <p>9 Ms. Ablin.</p> <p>10 MS. ABLIN: Good afternoon, Your 11 Honors.</p> <p>12 My name is Karyn Ablin. And as 13 Bruce Joseph mentioned this morning, I 14 represent, in addition to the National 15 Association of Broadcasters, the National 16 Religious Broadcasters Noncommercial Music 17 license Committee. They're participating in 18 this proceeding on behalf of Noncommercial 19 Religious Broadcasters that primarily simulcast 20 online their broadcast programs.</p> <p>21 Now, you've heard a lot today so far 22 about the commercial licensing participants, 23 including the special class of licensees that 24 are commercial broadcast simulcasters.</p> <p>25 So for what I hope will be a welcome</p>
203	<p>1 Webcasting and performance royalties based on 2 all of these other types of revenue that would 3 get swept up somehow in this calculation.</p> <p>4 And there's really no good accurate 5 way to try to apportion that revenue so that 6 you only get out a base that's truly and 7 directly related to just the Webcasting of 8 sound recordings.</p> <p>9 Certainly any attempt at coming up 10 with a formula like that would be subject to 11 tremendous dispute and litigation. And even if 12 you could come up with an apportionment that 13 was accurate and that you were comfortable with 14 for SiriusXM, that same apportionment certainly 15 wouldn't apply to any of the other Webcasters 16 in the marketplace.</p> <p>17 And, in fact, you heard 18 Mr. Pomerantz say in his opening that 19 SoundExchange doesn't believe that there should 20 be price discrimination amongst the servicers; 21 and that the judges, when they implement a 22 rate, should not be favoring one business model 23 over another. But the percentage of revenue 24 formula, no matter how you try to craft, will 25 inherently do just that.</p>	205	<p>1 change of pace, at least for a few moments 2 before we head into restricted session, I'd 3 like to give you a preview of what the evidence 4 will show regarding noncommercial broadcast 5 simulcasters. And specifically I'd like to 6 touch on three points.</p> <p>7 First, I'll talk about some 8 similarities that noncommercial broadcasters 9 and commercial broadcasters share as radio 10 broadcasters that distinguish them from other 11 licensee participants whose only transmissions 12 to listeners occur over the Internet.</p> <p>13 All of the features that Mr. Joseph 14 mentioned in his opening statement regarding 15 commercial broadcast of simulcasters also point 16 to a lower rate for noncommercial simulcasters.</p> <p>17 Second, I'll talk about some 18 fundamental differences between noncommercial 19 broadcasters and commercial services, both in 20 how they conduct their operations and in the 21 license rates that they pay.</p> <p>22 And, in fact, noncommercial 23 broadcasters and Webcasters always have paid 24 very different and much lower rates than 25 commercial Webcasters in every Webcasting</p>

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206	<p>1 license period to date since the right was 2 first expanded to cover Webcasting about 17 3 years ago. 4 And then third and finally, I'll 5 talk about some fundamental differences in 6 SoundExchange's and the NRB-NMLC's rate 7 proposals and what the evidence will show 8 regarding those proposals. 9 You'll hear testimony from the 10 NRB-NMLC's witnesses regarding how important it 11 is for noncommercial broadcasters to be subject 12 to predictable and affordable fees as well as 13 evidence regarding other noncommercial rates 14 that are structured as flat fees. 15 This evidence is most consistent 16 with the tiered and capped flat-fee structure 17 proposed by the NRB-NMLC and most consistent 18 with the rates that willing buyers will seek 19 and willing sellers will adopt. 20 So the NRB-NMLC will present two 21 witnesses who will address these points. 22 The first is Mr. Joe Emert. He's 23 been involved in Christian broadcasting for 24 over 45 years. He is the founder and president 25 of Life Radio Ministries, which is celebrating</p>	208	<p>1 proceeding. And as I said, those trades apply 2 equally to noncommercial broadcasters as well. 3 First, like commercial broadcasters, 4 the primary online transmissions of 5 noncommercial religious broadcasters are 6 simulcasts of their religious terrestrial radio 7 programming. The only significant difference 8 is how you hear that programming. It's over 9 the Internet instead of over the air. 10 Second, like commercial 11 broadcasters, noncommercial broadcasters 12 simulcast programming by the same hosts and DJs 13 who keep the listeners company on their 14 terrestrial broadcast. 15 Mr. Emert and Mr. Henes will both 16 testify how they personally host portions of 17 programming on their respective stations and 18 how many of their other staff members do as 19 well. 20 Third, like commercial broadcasters, 21 noncommercial broadcasters actively foster 22 strong connections with the local communities 23 that they serve. You'll hear from Mr. Emert 24 how four of New Life FM's six member staff have 25 lived and worked in New Life FM's broadcast</p>
207	<p>1 its 20 anniversary this year and operates two 2 stations as New Life FM in the Atlanta, Georgia 3 area. 4 Second witness is Mr. Gene Henes. 5 He's been involved in Christian broadcasting 6 for over 20 years. He is the president of the 7 board of directors of the Prayz Network based 8 in Northern Nebraska. The Prayz Network has 9 been operating for over 25 years, and over that 10 time it has grown to nine radio stations and FM 11 translators that cover low population areas in 12 four states throughout the Midwest. 13 Now, Mr. Emert and Mr. Henes will 14 testify that the format on the stations that 15 they operate consist of a mix of both Christian 16 talk and teaching programs as well as 17 inspirational praise and worship and Christian 18 contemporary music. And both have used 19 broadcasting simulcasting for several years. 20 So my first point: Similarities 21 between noncommercial and commercial 22 broadcasters. 23 Mr. Joseph provided a list of trades 24 that distinguish radio simulcasters and other 25 types of services participating in this</p>	209	<p>1 community for at least 18 years of New Life's 2 20-year existence. 3 And Mr. Henes will similarly testify 4 how he has been with the Prayz Network in that 5 community in the Midwest for over 20 years. 6 Fourth, similarity: Like commercial 7 broadcasters, noncommercial broadcasters 8 transmit substantial amounts of nonmusic 9 programming that contribute significantly to 10 the popularity and unique flavor of those 11 broadcasts as simulcasts. 12 As the New Life FM and Prayz Network 13 witnesses will testify, this programming 14 includes several nationally renowned talk and 15 teaching programs such as "Uncommon Moments" 16 with former Super Bowl winning Coach Tony Dungy 17 as well as Chuck Swindoll's "Insight For 18 Living." 19 You'll also hear from Mr. Emert how 20 its online listenership peak during hours when 21 New Life FM is transmitting teaching program 22 rather than music. 23 While Mr. Emert and Mr. Henes agree 24 that the music that their organization transmit 25 is also important, there are plenty of other</p>

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210	<p>1 places to listen to wall-to-wall Christian 2 music online rather than a noncommercial 3 religious simulcast of a locally flavored mix 4 of Christian talk and support. 5       Instead, like commercial 6 broadcasters, noncommercial broadcasters are 7 frequently and aggressively solicited by 8 artists and record companies to obtain air play 9 which necessarily results in air play not only 10 over the air but also in their simulcasts. 11       And Mr. Emert and Mr. Henes will 12 testify to that effect and how artists thank 13 them when they do receive the air play that 14 they've requested. 15       Mr. Henes also will testify how one 16 of his stations has received so many 17 solicitations for air play that it adopted a 18 local artist policy, which provides guidance 19 for artists seeking air play of their songs and 20 warns artists that not every song that's 21 committed to the station will actually make it 22 on the air. 23       And a sixth similarity is that, like 24 commercial broadcasters, noncommercial 25 broadcasters stream in large part as a way to</p>	212	<p>1 to nonsubscription Webcasting shall distinguish 2 among the different types of services in 3 operation. 4       And as the evidence will show, 5 differences between noncommercial and 6 commercial entities affect both the rates the 7 willing noncommercial buyers would agree to pay 8 and the rates that willing sellers would agree 9 to accept. 10       So one difference is in the mission 11 and nonprofit purpose that noncommercial 12 entities have. 13       Noncommercial religious broadcasters 14 are organized and operated exclusively to 15 advance religious, charitable, educational or 16 other nonprofit goals. 17       As Mr. Emert and Mr. Henes will 18 describe, the success of their ministries is 19 not defined by profits. Instead it's defined 20 by the listeners who are enriched and uplifted 21 by experiencing their programming, whether that 22 programming is a teaching programming providing 23 parenting advice, the message from an 24 encouraging song that infuses their listeners 25 with new purpose for living, or even a hosted</p>
211	<p>1 connect with their local over-the-air 2 listeners. And their simulcast audiences 3 typically are far smaller than those broadcast 4 audiences. 5       Both Mr. Emert and Mr. Henes will 6 describe how streaming is not a standalone 7 product for them, the way it is for many other 8 services in this proceeding, but it's a tool to 9 serve their broadcast listeners. And they'll 10 also tell you about how the vast majority of 11 their listenership comes from within the 12 broadcast reach of their stations. 13       Each of these traits I've just gone 14 through are shared by both commercial and 15 noncommercial broadcast simulcasters and 16 support entry of a lower rate for such services 17 than for other types of services. 18       And then second, having discussed 19 the similarities, I'll now discuss some of the 20 differences that distinguish noncommercial 21 entities from commercial ones. 22       And first, why are these differences 23 important? Well, that's a simple answer. 24       Under governing statute, congress has 25 commanded that the rates and terms applicable</p>	213	<p>1 call-in show that allows listeners to interact 2 with the host and share prayer with them. 3       In other words, noncommercial 4 religious broadcasters are engaged in a labor 5 of love to serve their listeners by offering 6 encouragement and teachings that nourishes the 7 human spirit. 8       A second way in which noncommercial 9 broadcasters differ from commercial entities is 10 in how they fund their operations. 11       Unlike commercial broadcasters, 12 noncommercial broadcasters cannot sell ads. 13 And listeners will not hear such ads when they 14 tune in to that lower end of the dial on a 15 noncommercial broadcast or simulcast. 16       Instead the evidence will show that 17 noncommercial broadcasters must depend 18 primarily on support from individual listener's 19 donations. 20       Mr. Emert and Mr. Henes will testify 21 also that, unlike NPR, noncommercial religious 22 broadcasters do not receive government funding 23 to supported their operations. And so the 24 generosity of their listeners becomes that much 25 more critical to maintaining their ministries.</p>

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214	<p>1 A third difference lies in how</p> <p>2 noncommercial broadcasters use the funds that</p> <p>3 they receive.</p> <p>4 Mr. Emert and Mr. Henes will discuss</p> <p>5 that, because of their organizations' nonprofit</p> <p>6 status, they used the funds that they receive</p> <p>7 to serve their listeners, not to pay out</p> <p>8 profits to their owners. If their operations</p> <p>9 and funning were to grow, they would not pocket</p> <p>10 that money; but rather, that additional money</p> <p>11 would enable them to expand their outreach and</p> <p>12 serve more people than this.</p> <p>13 Now, these differences do not exist</p> <p>14 in a void, but they have consistently</p> <p>15 translated into very different and lower</p> <p>16 license fees for noncommercial broadcasters</p> <p>17 than those that have been set for commercial</p> <p>18 entities.</p> <p>19 You'll hear testimony from</p> <p>20 SoundExchange witness Thomas Lys that</p> <p>21 noncommercial and commercial broadcasters</p> <p>22 really aren't that different and that one class</p> <p>23 of Webcasters should not be treated differently</p> <p>24 than another.</p> <p>25 But the evidence presented to Your</p>	216	<p>1 entities.</p> <p>2 First is the agreement between the</p> <p>3 college broadcasters, a participant in this</p> <p>4 proceeding, and SoundExchange that was filed</p> <p>5 with Your Honors in this case last October.</p> <p>6 That agreement included a flat \$500</p> <p>7 fee for and allotment of aggregate tuning</p> <p>8 hours, which I will refer to as ATH, that,</p> <p>9 based on SoundExchange licensee data appears</p> <p>10 large enough to ensure that all eligible</p> <p>11 educational Webcasters would fall below that</p> <p>12 threshold and not -- pay no more than that flat</p> <p>13 \$500 cap annually.</p> <p>14 Second is and agreement between</p> <p>15 national public radio and SoundExchange that</p> <p>16 was filed with Your Honors last February. That</p> <p>17 agreement sets a single flat fee for a large</p> <p>18 annual loment of music ATH that covers hundreds</p> <p>19 of originating stations and translators across</p> <p>20 NPR's entire network.</p> <p>21 And if NPR exceeds the number of</p> <p>22 covered stations provided for in that</p> <p>23 agreement, it's able to add additional stations</p> <p>24 under the agreement for a flat \$500 apiece. No</p> <p>25 usage fees apply.</p>
215	<p>1 Honors will show the opposite and will not only</p> <p>2 confirm why every Webcasting rate setting</p> <p>3 proceeding to date has set different and lower</p> <p>4 rates for noncommercial Webcasters, including</p> <p>5 rates proposed by the copyright owners in the</p> <p>6 very first Webcasting proceeding that reflected</p> <p>7 a two-thirds discount from commercial rates,</p> <p>8 but also it will confirm the conclusion of the</p> <p>9 arbitrators in Web I that applying the same</p> <p>10 commercial broadcaster rates to noncommercial</p> <p>11 entities, quote, front common sense.</p> <p>12 To begin with, you'll hear</p> <p>13 SoundExchange's own witness, Daniel Rubinfeld,</p> <p>14 propose noncommercial rates that are different</p> <p>15 and lower than those he proposes for commercial</p> <p>16 Webcasters. Thus, despite what Professor Lys</p> <p>17 has said, there's really no dispute between the</p> <p>18 willing buyers and sellers in this proceeding</p> <p>19 that noncommercial Webcasters should pay</p> <p>20 different rates, at least in some extent.</p> <p>21 There's also other evidence that has</p> <p>22 been or will be presented to Your Honors that</p> <p>23 shows that willing buyers and willing sellers</p> <p>24 have agreed to different lower noncommercial</p> <p>25 rates than those that apply to noncommercial</p>	217	<p>1 While NPR is somewhat different from</p> <p>2 noncommercial religious broadcasters in that it</p> <p>3 can rely on government funding, the flat-fee</p> <p>4 structure of this agreement is nonetheless</p> <p>5 instructive of what willing buyers and willing</p> <p>6 sellers would agree to.</p> <p>7 Third, Mr. Emert will also testify</p> <p>8 about the flat fees that apply to noncommercial</p> <p>9 broadcaster rates for performing musical works,</p> <p>10 which are set under the Section 118 statutory</p> <p>11 license in the Copyright Act.</p> <p>12 These flat fees were negotiated</p> <p>13 between noncommercial broadcasters on the one</p> <p>14 hand and ASCAP BMI and SESAC on the other. And</p> <p>15 they're tiered based on market size, but they</p> <p>16 do have an absolute cap for even the biggest</p> <p>17 stations in the largest markets.</p> <p>18 And fourth, Mr. Emert will discuss a</p> <p>19 provision that SoundExchange publicly supported</p> <p>20 in proposed legislation to create a full sound</p> <p>21 recording performance right that would apply to</p> <p>22 terrestrial radio.</p> <p>23 That bill was introduced in 2009,</p> <p>24 and it includes a special provision for</p> <p>25 noncommercial broadcasters that would enable</p>

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218	<p>1 them to pay either a flat annual fee of \$500 if 2 their gross receipts are less than \$100,000 or 3 no more than \$1,000 annually if their receipts 4 exceed that amount.</p> <p>5 And while Mr. Emert and the 6 NRB-NMLC, to be clear, strongly oppose the 7 enactment of any such legislation, and while 8 not too much can be read from and unenacted 9 bill, Mr. Emert will nonetheless testify that 10 the bill does reveal something about the 11 willingness of SoundExchange as a willing 12 seller to accept modest flat fees from 13 noncommercial broadcasters that are different 14 and much lower than the fees that it would seek 15 to apply to commercial broadcasters if this 16 bill were enacted.</p> <p>17 And my third and final point, I'll 18 touch briefly on some aspects of 19 SoundExchange's and the NRB-NMLC's rate 20 proposals that have been presented to Your 21 Honors.</p> <p>22 And I'll start by mentioning one 23 similarity between the two sides' proposals. 24 Both SoundExchange and the NRB-NMLC have 25 proposed a flat \$500 annual fee to cover</p>	220	<p>1 noncommercial Webcasters have actually not been 2 paying those usage fees under the public CRB 3 rates that are specified in the regulations. 4 And that's not because there aren't any 5 noncommercial Webcasters who exceed that cap. 6 There are.</p> <p>7 But those Webcasters have been 8 paying those additional fees that would accrue 9 not under the published rates but instead under 10 an alternative Webcaster Settlement Act 11 Agreement that include much lower rates than 12 those that appear in regulations.</p> <p>13 In addition, both Mr. Emert and Mr. 14 Henes will testify that even the largest 15 noncommercial broadcasters that simulcast the 16 most do not suddenly lose their nonprofit 17 status and start pocketing profits if they 18 reach a certain size. But rather they're 19 simply able to reach or more listeners with 20 their ministry without additional size and 21 funding.</p> <p>22 This evidence demonstrates that 23 there is no basis to apply commercial usage 24 rates to noncommercial broadcasters at any 25 size; and that to do so, in the words of the</p>
219	<p>1 transmissions up to a certain number of average 2 listeners, although they do differ in the 3 number of average listeners that would be 4 covered by that fee.</p> <p>5 So in this respect, SoundExchange's 6 proposal differs from what they've proposed for 7 commercial entities. And the NRB-NMLC 8 appreciates SoundExchange's recognition that 9 noncommercial broadcasters should be subject to 10 different rates.</p> <p>11 The biggest difference between the 12 two proposals, however, is what happens above 13 that \$500 listener account.</p> <p>14 So Your Honors will hear testimony 15 from SoundExchange witness Daniel Rubinfeld 16 asserting that there is no marketplace evidence 17 from which to set noncommercial rates and that 18 the judges therefore should just default to the 19 rates that currently are published in the 20 regulations, which apply commercial usage rates 21 to noncommercial broadcasters that exceed that 22 specified ATH.</p> <p>23 But the there's a problem with that 24 proposal. Evidence from SoundExchange's own 25 licensing payment data will show that</p>	221	<p>1 Web I arbitrators, affronts common sense.</p> <p>2 In contrast, the SoundExchange 3 proposal for what should happen above the cap, 4 the NRB-NMLC proposed flat-fee tiers of \$200 5 for each additional 100 listeners capped at 6 \$1,500 per station per year.</p> <p>7 You'll hear testimony from Mr. Emert 8 and Mr. Henes about the importance of 9 predictable and affordable fees to them as 10 willing noncommercial buyers because they do 11 not know in advance how generous their 12 listeners will be in any given year; and 13 therefore, they need to plan how much time 14 every year they'll be forced to divert from 15 their core mission of reaching and serving 16 their listeners to instead attempting to 17 persuade those same listeners to donate to them 18 so that they continue to do what they do. And 19 the more that fees go up, the more time that 20 noncommercial broadcasters will have to divert 21 to fund-raising.</p> <p>22 Mr. Emert will testify that he's 23 encountered many noncommercial broadcasters 24 that don't stream at all under the current 25 rates because they're so concerned with</p>



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222	<p>1 incurring large royalty obligations. And he'll 2 also testify that he's personally aware of 3 other broadcasters that impose caps on their 4 programming specifically to avoid incurring 5 usage fees above those caps and how this runs 6 counter to noncommercial religious 7 broadcasters' core mission of listener 8 outreach. 9 Mr. Emert and Mr. Henes will also 10 testify that the NRB-NMLC's proposed flat fee 11 tiers will provide more predictable and 12 affordable fees for noncommercial broadcasters, 13 and that that will provide an incentive for 14 noncommercial broadcast simulcasters actually 15 to increase their streaming and therefore the 16 royalties that SoundExchange will receive from 17 them as long as those fees are predictable and 18 affordable. 19 Mr. Emert also will testify about 20 the fixed fee cap, including testimony 21 regarding other rate structures -- and I've 22 gone through some of those -- where 23 SoundExchange or willing selling copyright 24 owners have agreed to fixed caps even for the 25 largest stations.</p>	224	<p>1 at all in addition to the music that they do 2 play and that they do not believe that 3 programming that does not include sound 4 recordings should make their sound recording 5 fees increase. 6 And so to recap, noncommercial 7 broadcast simulcasters share many traits with 8 commercial broadcasters that support giving 9 noncommercial broadcasters any benefits in 10 lower rates that Your Honors determine to be 11 warranted for commercial broadcast 12 simulcasters. 13 But in addition, there are strong 14 reasons to give noncommercial broadcasters much 15 lower rates even than commercial broadcasters 16 because, one, noncommercial broadcasters don't 17 do what they do to make money or simply to 18 entertain but rather to offer spiritual 19 encouragement to their listeners through 20 teaching, practical advice and, yes, inspiring 21 music to help them navigate life's challenges. 22 Two, noncommercial religious 23 broadcasters primarily rely on the generosity 24 of their listeners to support their outreach. 25 And they pour those dollars right back into</p>
223	<p>1 And I'll touch just briefly on two 2 other features of the NRB-NMLC's proposal. 3 First, the NRB-NMLC proposes to 4 convert the ATH allotment committed under the 5 \$500 annual fee to an annual rather than a 6 monthly quota. 7 Mr. Emert will testify that it would 8 be easier at administratively to calculate fees 9 due for exceeding the listener allotment 10 committed under that \$500 fee one time annually 11 instead of having to reset the quota and figure 12 out additional fees that would apply every 13 month. 14 Second, the NRB-NMLC proposes to 15 clarify the ATH definition to make clear that 16 only aggregate tuning hours that actually 17 include sound recordings subject to the 18 statutory licensing should count toward 19 determining when that ATH threshold is hit. 20 Mr. Emert and Mr. Henes will both 21 testify that this is a particularly important 22 clarification for noncommercial religious 23 broadcasters, such as themselves, as they play 24 significance amounts of Christian talk and 25 teaching programs that don't include any music</p>	225	<p>1 this those listeners to enhance their outreach 2 effectiveness. 3 And three, the evidence in past 4 Webcasting rate setting history before Your 5 Honors shows that noncommercial broadcasters 6 consistently have paid much lower rates than 7 commercial entities. 8 So the NRB-NMLC respectfully request 9 that Your Honors take into account all of these 10 differences and the consistent history that's 11 always distinguished noncommercial broadcasters 12 from commercial entities in determining rates 13 that would apply to noncommercial broadcast 14 simulcasters. 15 Thank you. 16 CHIEF JUDGE BARNETT: Thank you. 17 Mr. Malone, would you like to just 18 hold that microphone there and make your 19 statement from where you sit? 20 MR. MALONE: I'm prepared to come 21 up, Your Honor. 22 CHIEF JUDGE BARNETT: Okay. 23 MR. MALONE: Good afternoon, Your 24 Honor. 25 I represent the Intercollegiate</p>

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226	<p>1 Broadcasting System, which is not going to have 2 any ATH itself from its members. 3 CHIEF JUDGE BARNETT: Could I ask 4 you to pull the microphone down a little bit. 5 There you go. Thank you. 6 MR. MALONE: And it represents the 7 largest group of so-called college stations in 8 the United States and also a few overseas. 9 These stations vary among themselves. 10 They are also joined by high school 11 stations and high school streamers. And their 12 hours of operation are obviously much 13 different. And they don't -- very few of the 14 college -- the quote, unquote, college stations 15 operate year round. So we're talking about a 16 much smaller number of hours per year than your 17 average commercial station. 18 In addition, of course many of these 19 stations are operated by state educational 20 institutions, local institutions. And as such, 21 of course, they have certain restrictions on 22 them under state law. And also the 23 SoundExchange rates appear as a tax on state 24 operations, which is certainly questionable. 25 But I think I am fairly on sound</p>	228	<p>1 motion published in the Federal Register as to 2 SoundExchange, NPR, CPB petition for an 3 approval of their agreed rate. 4 And while this is labelled an 5 objection, the objection is not to the 6 substantive aspect of that proposal but rather 7 to the timing. 8 And our feeling is that, in prior 9 proceedings, we've been prejudiced by the 10 board's making up its mind that it wanted to 11 accept that and then took care of the small 12 stations, which, you know, typically have 13 listeners other than varsity sports of about 14 five -- five listeners. So you're looking at 15 five ATH. 16 And the -- we certainly agree with 17 the petition that distinguishes noncommercial 18 and commercial streamers. And we take the 19 position basically that that is -- we'd like to 20 use the SoundExchange NPR, CPB petition rates 21 as a basis for determining what a proportional 22 value of the music hours would be. 23 And if you look at the five 24 listeners per hour, it's certainly far, far 25 less than \$500. And the \$500, to the extent</p>
227	<p>1 ground in saying that college broadcasters, 2 quote, unquote, are noncommercial educationally 3 affiliated streamers. They, in many cases, 4 have instructional responsibilities, such as 5 the music one final exam preparation. 6 They also -- and their programming 7 is -- in terms of the listenership is 8 relatively small. That is they don't use music 9 -- they don't sell music. They use music as an 10 instructional tool for students to learn about 11 the real life in the commercial area -- in the 12 industry area. 13 I think that the two written direct 14 statements from Captain Kass and Mr. Papish 15 describe two mutually consistent but somewhat 16 different methods of operation and purposes of 17 operation and indicate though both that varsity 18 sports broadcasts are much, much more popular 19 with their listeners than the programs that are 20 devoted to training. 21 And the -- well, I think that that's 22 basically -- unless you have any questions, 23 that's what college radio, campus radio is all 24 about. 25 Now, IBS has filed a comments on the</p>	229	<p>1 it's paid, is a deterrent to the education of 2 the students in the new digital world. 3 And we think that there is a -- not 4 only a public interest there, but it's also and 5 interest of the industry to encourage students 6 to participate in the digital music world. 7 Now -- and so I think that, if I 8 clarified that point, I don't mean to hold up 9 the SoundExchange NPR CP agreement -- CPB 10 agreement. But I do think that it needs to be 11 -- proceed on the basis that the -- that it 12 won't prejudice the really small operators. 13 Now, the earlier SoundExchange-CBI 14 agreement, also published in the Federal 15 Register, we do oppose substantively. We don't 16 feel that that represents the bulk of the 17 campus radio operations. 18 CDI's membership by and large has 19 been derived from the CMA or the Campus 20 Marketing Association, which is a group that 21 deals with full-time paid media people on 22 campus. 23 And the campus stations by and large 24 do not have -- well, they don't pay salaries to 25 begin with. And they by and large don't have</p>

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230	<p>1 paid faculty. They may have faculty advisers 2 with and additional duty who will sign, you 3 know, their initials once a year to the deed. 4 But these are student-run 5 operations. And that's the real virtue in 6 them, is that the students learn by doing; they 7 learn by having responsibility. 8 And it may be that occasionally 9 you'll get a balance sheet that doesn't 10 balance. And that's the instructional 11 opportunity. And some of the stations have, as 12 Mr. Papish indicates, retreats in the spring 13 off campus in which they have accountants, 14 salesmen and other expert people teach the 15 student management something they're not get in 16 any of the other courses in their college 17 career. 18 And the -- so then I think that that 19 is not a fact that some CBI members, which are 20 bigger paid, that was with a minimum of five 21 paid -- or I'm sorry -- with paid employees -- 22 the fact that they're paying more is fine for 23 them, but it's not something that's 24 particularly appropriate for the smaller campus 25 stations.</p>	232	<p>1 restricted for the rest of the day so. 2 So we'll be at recess for 15 3 minutes. 4 (A short recess was taken.) 5 CHIEF JUDGE BARNETT: Good 6 afternoon. 7 Please be seated. 8 MR. STEINTHAL: This is not an 9 opening statement, but in talking to the 10 participants, we thought this was the opportune 11 time after the other non-commercial entities 12 made their presentations, for me to just share 13 a couple of thoughts with you about the NPR 14 settlement exchange process. 15 As you know, on February 24th, we 16 filed a joint motion to adopt settlement 17 between SoundExchange and NPR, and it covers 18 what is defined as covered entities under the 19 settlement agreement, which are National Public 20 Radio, American Public Media, Public Radio 21 International, Public Radio Exchange, and the 22 NPR CPB affiliated stations up to 530 such 23 originating public radio stations, and it 24 covers the Section 114 transmissions and the 25 licensing, of course, made by these covered</p>
231	<p>1 And so our position here is simply 2 that this is a group that is large enough, much 3 larger than the CBI group -- I don't know, 800 4 at least, maybe more -- they -- you shouldn't 5 buy a rate set based on a different population. 6 And so we would ask for a 7 proportional rate based on ATH keyed off of the 8 SoundExchange-NPR-CPB rate they explain legally 9 why a noncommercial stations are appropriately 10 titled to the appropriate rate. 11 CHIEF JUDGE BARNETT: Thank you, Mr. 12 Malone. 13 We will take our afternoon recess 14 for 15 minutes. 15 And the courtroom will -- or excuse 16 me. 17 The hearing room will be closed 18 after the recess. So anyone who's here now who 19 has not signed a nondisclosure certificate and 20 is not privy to the information that was marked 21 as restricted during the course of discovery in 22 this proceeding will have to wait outside for 23 the balance of the day. 24 Or you may go home. I don't think 25 we're going to do anything that's not</p>	233	<p>1 entities. 2 We are a single licensee, which 3 undertakes to handle the myriad selection, 4 administration and consolidated reporting 5 functions across the whole group of covered 6 entities which SoundExchange otherwise would 7 need to undertake. Importantly, the settlement 8 covered and binds only covered entities, as I 9 have defined that term and as set forth in the 10 agreement. It's a closed group of licensees. 11 There are no other non-commercial service 12 participants that are covered by that 13 agreement, and we are submitting it with 14 SoundExchange to the CRB for adoption to ensure 15 that the settlement is binding, not just on 16 SoundExchange, but all the other copyright 17 owners and performers who are not SoundExchange 18 members. 19 On March 26th, Your Honor published 20 a notice and request for comments about that 21 subject. Under Section 807(b)(7)(A), it is 22 provided that the Copyright Royalty Board has 23 the authority to adopt, as statutory terms and 24 rates, an agreement between some or all 25 participants. And 807(b)(7)(A) provides that</p>

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234	<p>1 only if both of two things, a participant who 2 would be bound by the agreement, by the 3 settlement agreement, and if Your Honors 4 conclude that the rates and terms in the 5 settlement agreement do not provide a 6 reasonable basis for setting statutory terms 7 and rates, only if both of those elements are 8 present is there a basis for adoption to be 9 rejected.</p> <p>10 Now, pursuant to our settlement 11 agreement, the parties, SoundExchange and we, 12 NPR, agreed not to file rebuttal statements as 13 to the case between us and we agreed to pursue 14 adoption of the settlement under 801(b)(7). 15 That's why we didn't submit rebuttal statements 16 and that's why we didn't sign up for an 17 allocation of time, but evidence during the 18 hearings.</p> <p>19 Now, just briefly, there is no 20 statutory basis here for conceivably rejecting 21 the settlement. As I said, only if both of 22 those two elements are present. It has to be 23 somebody who would be bound by the settlement 24 that objects. Here, the only comment received 25 at all was from IBS. As for IBS, neither IBS</p>	236	<p>1 colleagues disagree and want to confer on this, 2 the deadline has passed for comments, that is 3 correct, and there is only the one comment from 4 IBS regarding your settlement. And, at this 5 point, it's a matter of logistics. We have to 6 forward the settlement as final rules to the 7 librarian for him to sign off, and that needs 8 clearance through several people internally and 9 also approval by the Federal Register. We have 10 to do what they tell the us as far as 11 formatting and all that sort of thing. And 12 they're different -- picky. We've been working 13 with them for a while, so we sort of know what 14 they expect.</p> <p>15 But given the fact that we have no 16 reason not to recommend acceptance or to seek 17 the librarian's signature, it seems to me that 18 there would be no reason for you to have to 19 remain and participate in this proceeding.</p> <p>20 MR. STEINTHAL: Well, thank you very 21 much. And that's really what NPR wanted to 22 know. Didn't want this to go without comment 23 one way or the other, so I thank you for the 24 time and interrupting everybody's openings. So 25 thank you.</p>
235	<p>1 nor any of its constituent stations are covered 2 entities under our settlement. No one that 3 would be bound, quote/unquote, under 801(b)(7) 4 has objected or commented on our settlement. 5 So, in our view, there is no statutory basis at 6 all not to adopt the settlement. And, of 7 course, as you've heard from Mr. Malone, IBS 8 doesn't really object to the rates and terms in 9 our settlement. It's simply a matter of timing 10 from their perspective.</p> <p>11 So I come to you -- I submit that 12 there's no basis or reason to delay the 13 adoption of our settlement. There is no 14 prejudice to Mr. Malone's clients as long as he 15 is not prejudiced in making whatever arguments 16 about proportionate rate he wants to make; but, 17 certainly, that shouldn't delay adoption of our 18 settlement. And, in these circumstances, I 19 come to you asking for guidance as to how you 20 would like us to proceed.</p> <p>21 Is there anything you want from us, 22 more than what we've done, which I think is 23 absolutely all that's needed to approve 24 adoption of our settlement?</p> <p>25 CHIEF JUDGE BARNETT: Unless my</p>	237	<p>1 CHIEF JUDGE BARNETT: Certainly. 2 Now, with regard to -- with regard 3 to CBI, has the deadline come on that one yet?</p> <p>4 MR. STEINTHAL: Your Honor, I 5 believe the representative of CBI has left for 6 the day.</p> <p>7 CHIEF JUDGE BARNETT: He threw in 8 the towel.</p> <p>9 Yeah, I printed out the wrong one 10 and I believe we published CBI before NPR; 11 isn't that correct?</p> <p>12 MR. STEINTHAL: Yes.</p> <p>13 CHIEF JUDGE BARNETT: Thank you. 14 Okay. But since they're not here 15 and he's not asking, I'm not saying.</p> <p>16 Mr. Pomerantz, did you have more as 17 closed hearing presentation?</p> <p>18 MR. POMERANTZ: If you will tolerate 19 it, yes, I have a few more minutes.</p> <p>20 CHIEF JUDGE BARNETT: I think you 21 have a very few.</p> <p>22 MR. POMERANTZ: I think we have 25, 23 as we counted.</p> <p>24 CHIEF JUDGE BARNETT: I trust your 25 count.</p>

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1 (THIS ENDS PUBLIC SESSION)  
2 (RESTRICTED SESSION BOUND SEPARATELY)  
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1 CERTIFICATE OF COURT REPORTER  
2  
3 I, Bonnie L. Russo, do hereby certify that  
4 the foregoing transcript is a true record of  
5 the proceedings to the best of my ability, that  
6 I am not related to or employed by any of the  
7 parties involved in these proceedings, and,  
8 further, that I am not a relative or employee  
9 of any attorney or counsel employed by the  
10 parties hereto, or financially interested in  
11 the proceedings.  
12  
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14 \_\_\_\_\_  
15 Notary Public  
16 My Commission Expires:  
17 May 31, 2015  
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